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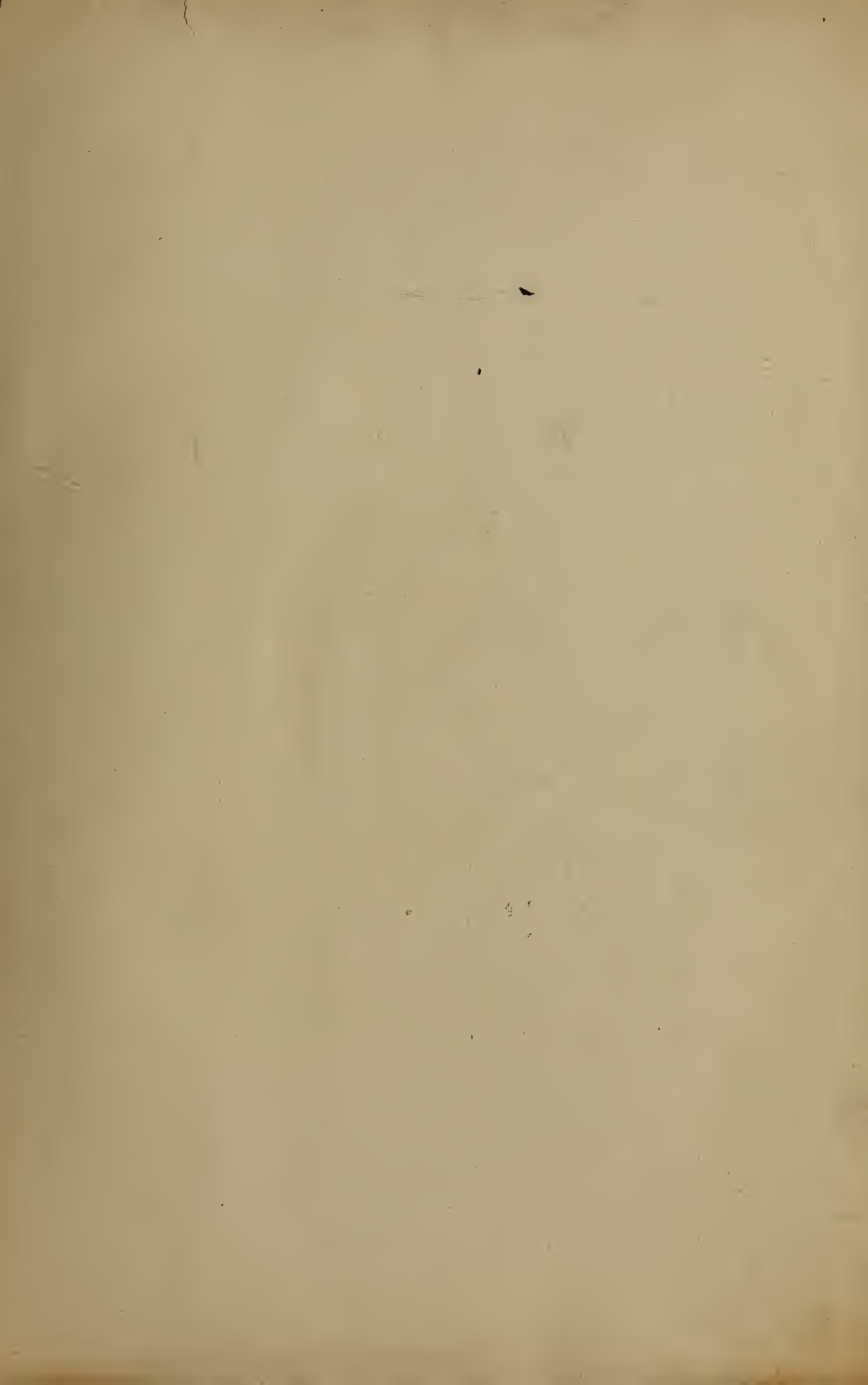
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# THE LAW OF PROBATE

INCLUDING

ADMINISTRATION, GUARDIANSHIP,  
CONTENTIOUS PROCEEDINGS,  
CUSTODY OF INFANTS,  
SUCCESSION DUTY,  
ETC.

BY

A. WEIR, B.A., LL.B.

AUTHOR OF THE LAW OF ASSESSMENT


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## CHAPTER I.

### SURROGATE COURTS.

The Statute of Wills, 32 Hen. VIII. ch. 1, was the first enactment since the Norman Conquest to confer the power to devise lands by will. This power seems to have existed in Saxon times, but the feudal system, which came in with the Norman invasion, destroyed it. The Statute of Wills enabled all persons who were seised in fee simple, unless incompetent by reason of infancy, coverture, idiocy or lunacy, to devise two-thirds of their lands held in chivalry, and the whole of their lands held in socage. In the reign of Charles II. the conversion of military tenures into tenures by socage greatly extended the operation of such devises.

The power to bequeath personalty appears to have come down from the earliest period of English law. The power did not, however, originally extend to the whole of a man's estate, unless he died childless and a widower. In the reign of Henry II. one-third of a man's goods went to his descendants or heirs, one-third to his wife, and the other third might be disposed of by will; if he had no wife he might dispose of one-half, the children taking the other half. If he had a wife, but no children, she took half and he might dispose of the other half. By imperceptible degrees, through the centuries, the right to dispose of the whole of one's personal property by will, was acquired.

It would seem that in olden times in England, matters testamentary being under ecclesiastical jurisdiction, the goods of intestates vested in the Ordinary, who had in charge the administration of such estates, and who alone could grant probate of wills. The statute 31 Edw. III. ch. 11, provided that in case of intestacy the Ordinary should depute the next and most lawful or honest friends of the deceased to administer his goods, which administrators were put upon the same footing, with regard to suits and to accounting as executors appointed by

will. The statute 21 Henry VIII. ch. 5, enlarged a little more the power of the ecclesiastical Judge, and gave him a discretion to grant administration to the widow, or to the next of kin, or to both, and to select from those of the same degree of kindred whoever he thought fit.

If the deceased person left goods of the value of one hundred shillings in several dioceses, the Ordinary no longer had jurisdiction. Probate or administration must then have been granted by the Ecclesiastical Court of the Metropolitan of the province, by way of special prerogative, whence these courts come to be called Prerogative Courts. The ecclesiastical jurisdiction was thus separated into the two provinces of the Archbishop of Canterbury and York; and these were sub-divided into the dioceses of the various bishops.

In addition to these courts there were numerous others known as royal peculiar, peculiar and manorial which exercised jurisdiction in matters and causes testamentary, and had power to grant or revoke probate of wills or letters of administration of the effects of deceased persons.

Previous to the abolition of these courts by the Court of Probate Act, 20 and 21 Viet. ch. 77, it is said that they numbered no less than 372. In the year 1858, the Act last mentioned abolished the jurisdiction of all ecclesiastical, royal peculiar, peculiar, manorial and other courts, in respect to the grant or revocation of letters probate or letters of administration. A new court was constituted and established by the Act called the Court of Probate. This court was created a court of record, and was given the same powers throughout all England as the Prerogative Court of the Province of Canterbury had in matters arising within the jurisdiction of the latter court. The Act further provided that subject to Rules of Court which might be framed, the practice was to be according to that of the Prerogative Court of the Province of Canterbury in relation to testamentary matters and the effects of deceased persons, so far as the circumstances would permit.

The Court of Probate Act established district registries in the districts into which it divided England and Wales, but it was not obligatory upon any person to apply for probate or administration at the district registry, but in every case application might be made through the principal registry. The Court of Probate, so brought into existence, continued its functions until it was abolished by the Supreme Court of Judicature Act which came into effect on November 1st, 1875. Thereafter its functions were to be exercised by a division of the Supreme Court of Judicature, to be known as the Probate, Divorce and Admiralty Division. The practice of the Probate, Divorce and Admiralty Division in non-contentious business is regulated by the former practice of the Prerogative Court of Canterbury, as altered by the Court of Probate Acts of 1857 and 1858 and the rules and orders made thereunder. The rules of practice established under the Judicature Act relate only to contentious business. This being so, the practice in the Prerogative Court becomes of somewhat more than mere historic interest.

In Ontario, by section 37 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, the practice of the Surrogate Courts, where not otherwise provided by that Act or by the rules or orders made thereunder, shall, so far as the circumstances admit, be according to the practice in Her Majesty's Court of Probate in England, as it stood on the 5th day of December, 1859.

In Manitoba, under section 28 of the Surrogate Courts Act, R.S.M. 1902, ch. 41, the practice not specially provided for by the Act itself or by Rules of Court made thereunder is to be according to the practice of Her Late Majesty's Court of Probate in England, as it stood on the 15th day of July, 1870.

Section 21 of The Judicature Ordinance of the North-West Territories, being chapter XXI. of The Consolidated Ordinances, 1899, introduced in a general way, subject to the Ordinance and Rules of Court, the practice and procedure existing in the Supreme Court of Judicature in England on the first day of January, 1898.



The first Parliament of Upper Canada in its second session passed an Act to establish a Court of Probate in the province, and a Surrogate Court in each of the districts into which the province was then divided. These Courts had jurisdiction to grant probate of wills, and letters of administration of the goods of persons dying intestate. The Surrogate Courts of the districts had full power and authority to issue process and hold cognizance of all matters relative to the granting of the probate of wills and letters of administration of all and singular the goods and effects, rights and credits of persons dying within their respective districts. In all cases where a testator or intestate died possessed of goods, chattels or credits to the amount of five pounds in any district other than that in which he usually resided at the time of his decease, or left goods of the value of five pounds or upwards in two or more districts, jurisdiction belonged to the Court of Probate only, and not to any Surrogate Court. The Governor or Lieutenant-Governor of the province was the presiding officer of the Court of Probate, and might appoint an Official Principal of the said court with a Registrar and other officers.

The Act further provided for conditions upon which nuncupative wills should be admitted to probate. These have since been abolished, except as to the wills of soldiers and sailors.

*In re Hilts*, 1 Chy. Ch. 386, upon an application *ex parte* for an order to assign a probate bond under Consol. Stat. U.C., ch. 16, secs. 65-82, V.C., Mowat, citing Coote's Practice of the Ecclesiastical Courts, followed the usual procedure of the Ecclesiastical Courts, it not appearing that any subsequent statutory enactment or Rule of Court had varied or affected such procedure.

*Grant v. Great Western Railway Co.* (1858), 7 C.P. 438, was an action under Lord Campbell's Act against the defendants for the death of the plaintiff's husband through negligence. He resided in the State of New York, and while *in itinere* on the

defendants' railway he was killed in the County of Wentworth. Administration was granted by the Surrogate Court of the County of Wentworth to his widow, though the only goods he had in the county consisted of the clothing which he wore, and which was of less value than £5. At the trial, and upon appeal from the verdict against the defendants, it was contended that the Surrogate Court had under 33 Geo. III. ch. 8, no jurisdiction, but that the Probate Court had exclusive right to grant administration. Draper, C.J., in an elaborate and learned judgment dealt with the construction of the statute and the practice in the Ecclesiastical Courts. "It is obvious that this Act is framed on the assumption of the existence of a body of law which the machinery created by the Act can put into active execution. The law as to making wills of personalty, the rights and duties of executors, of legatees, of the next of kin of parties obtaining administration of the personal estate of persons who shall die intestate, is all taken by the language used in the Act to exist. The Act gives the power of administering that law to the courts which it creates. It, moreover, authorizes the appointment of an Official Principal, without any definition of his power, or authority, or duties, leaving all these to be gathered from his name, and from the fact that he is to be appointed by the Judge of the Court of Probate. Without reference to the Ecclesiastical Courts in England and to their jurisdiction in reference to wills and intestates' estates, there is no meaning to be attached to this name. The Act uses in respect to wills the terms proved, approved and insinuated, the two latter of which have their appropriate meaning in the Ecclesiastical Courts of England. It assumes these Courts may issue process, make orders, pronounce sentence and decrees on matters within their cognizance, without either declaring what their practice or forms or proceedings are to be in express words, giving these Courts authority to make rules to regulate their practice. . . .

"By virtue of his commission and instructions, the Governor was, before the passing of this Act, Ordinary of the province,

and had power committed to him to grant probate of wills and administration of the effects of parties dying intestate. I have arrived at the conclusion, upon a full consideration of this Act, that the Legislature of Upper Canada intended that the law of England relative to the grant of probate, and the committing of letters of administration, should be the law administered in the courts created by the Act of 1793, with the same process, pleadings and practice, unless where our statutes express to the contrary, as were in use in the Ecclesiastical Courts in England in relation to probates and letters of administration." He then proceeds to an elaborate and interesting inquiry as to which of the Ecclesiastical Courts of England would have jurisdiction in similar circumstances, the Prerogative or the Consistory Court. He came to the conclusion that the Ordinary had jurisdiction, and that consequently there was jurisdiction in the Surrogate Court to grant administration, and the judgment for damages against the defendants was upheld.

The Surrogate Courts, like the Probate Court in England while it was in existence under the Court of Probate Act, 1857, have jurisdiction both in common form, or non-contentious, business and in contentious business. Common form business was defined by section 2 of the Court of Probate Act, 1857, "as the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration." This definition has been substantially re-enacted in the Surrogate Court Acts of the various provinces of Canada.

Matters and causes testamentary are defined by the same section of the Court of Probate Act, 1857, as follows: "Matters and causes testamentary shall comprehend all matters and causes



relating to the grant and revocation of probate of wills or of administration." This definition has also been copied in the various Surrogate Court Acts of the various provinces.

"Will" by the statutory definition "shall comprehend testament and all other testamentary instruments of which probate may now be granted."

It will thus appear that the basis of the Surrogate Acts of the provinces is the English Court of Probate Act, 1857; R.S.O. 1897, ch. 59, sec. 2; R.S.M. 1902, ch. 41, sec. 2; B.C.C.A. 1897, ch. 41, sec. 2.

The Rules made in England in 1862 under the Court of Probate Act defined non-contentious business thus: "Non-contentious business shall include all common form business as defined by the Court of Probate Act, 1857, and the warning of caveats."

When there is a contest as to the title to probate or administration, and any person claiming a grant commences an action for the purpose of establishing his right to it, the business becomes contentious, and all proceedings or steps in the action from its commencement to its termination come within what is termed in probate language, the contentious business of the Court: Tristram & Coote, 13th ed., p. 349. The Surrogate Court Rules Ontario, enact that "a proceeding shall be adjudged contentious when an appearance has been entered by any person in opposition of the party proceeding, or when a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding, or when an application for grant is made on motion and the right to such grant is opposed, or when application is made to revoke a grant, or when there is contention as to the right to obtain probate or administration, and before contest terminated."

The Judicature Acts have no effect on the conduct of non-contentious business: *Tomlinson*, 6 P.D. 209; *Cartwright*, 1 P.D. 422. Such business is therefore conducted in the same manner as before the passing of these Acts.

The Court of Probate Act, 1857, vested the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons then vested in or which could be exercised by any Court or person in England, together with full authority to bear and determine all questions relating to matters and causes testamentary, in Her Majesty; and provided that such jurisdiction should, except as in the Act otherwise provided, be exercised in the Court of Probate.

The Surrogate Courts Act, R.S.O. 1897, ch. 59, sec. 17, confers practically the same authority on the Surrogate Courts of Ontario. "All jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estate or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration shall continue to be exercised in the name of Her Majesty in the several Surrogate Courts; but this provision shall not be construed as depriving the High Court of Jurisdiction in such matters." The 18th section, sub-sections 1, 2 and 3, of the same Act develops the definition somewhat more fully. It provides that the Surrogate Courts shall have full power, jurisdiction and authority:—

1. To issue process and hold cognizance of all matters relative to the granting of probates, and committing letters of administration, and to grant probate of wills and commit letters of administration of the property of persons dying intestate, having property in Ontario, and to revoke such probate of wills and letters of administration.

2. To hear and determine all questions, causes and suits in relation to the matters aforesaid, and to all matters and causes testamentary.

3. The same powers are continued in the Surrogate Courts

as were formerly possessed by the Court of Probate for Upper Canada.

The provisions of sub-sections 1 and 2, given above, are repeated almost verbatim in R.S.M. ch. 41, secs. 18 and 19.

In British Columbia the "Court" having jurisdiction in matters and causes testamentary is the Supreme Court of British Columbia or a Judge thereof. The Administration Act, 1897, is based largely on the English Act, 21 & 22 Vict., but it incorporates some earlier enactments.

The Judicature Ordinance, being chapter 21 of the Consolidated Ordinances of the North-West Territories, 1899, introduces the practice and procedure existing in the Supreme Court of Judicature in England on the first day of January, 1898, and directs that, subject to the Ordinances and Rules of Court, it shall be followed as nearly as possible in all causes, matters and proceedings in the Supreme Court of the North-West Territories, which has jurisdiction in all matters pertaining to probate and administration.

It is evident, therefore, that in all these provinces the English Statutes, with some modifications, form the basis of Surrogate Court practice.

In each county of Ontario there is a court of record called the Surrogate Court of the county, having a seal and presided over by the County Court Judge, or the Senior County Court Judge, if there are two Judges. The clerk of the County Court is the Registrar of the Surrogate Court, except in the County of York and in certain other specified cases. The Judge of the Surrogate Court and the Registrar must take certain prescribed oaths of office before entering upon their duties.

The powers and duties of the Surrogate clerk are also defined by the Act, section 8. He is to perform the duties required of him by the Act, by the Rules of Court heretofore in force or made under the Act, and such other duties as may be required of him by the High Court, of which he is declared to be an officer.

He is to be appointed, and may be removed, by the Lieutenant-Governor.

The main purpose of his office is disclosed in sections 44 to 51 of the Act. Notice has to be sent to him of every application for probate or administration, by the Registrar of the Court to which the application is made. To prevent the issue of letters probate or letters of administration in several counties of the property of the same deceased person, the certificate of the Surrogate clerk that no such application has been made in any other county, is made a condition precedent to the grant in the county in which the application is pending. If applications are made in several counties, proceedings are, upon notice thereof being given by the respective Registrars, stayed until a Judge of the High Court, upon application to him, has inquired into and summarily determined which Surrogate Court shall proceed. His decision is final and conclusive.

The main features of the English Wills Act, 1837, have been incorporated into the Statutes of the several provinces other than Quebec. The law in regard to testamentary capacity, undue influence, fraud, coercion, domicile, the formalities attendant on the execution of wills, their revocation and revival, the rights, powers, duties and liabilities of personal representatives,—in a word, the great body of the law relating to wills, probate and administration, is governed by English Statutes re-enacted with slight changes in the provinces, by England usage and English decisions. The great mass of the authorities cited must therefore be those of the English Courts.

## CHAPTER II.

### WHAT A WILL IS.

As probate deals with wills it is necessary to enquire what constitutes a will. "A testament is the true declaration of our last will, of that we would to be done after our death": *Termes de la Ley*. "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing duly executed according to the statute, and as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers so executed": *Lemage v. Goodban*, L.R. 1 P.D. 62; *Re Elcom* (1894), 1 Ch., p. 315.

Littleton uses "testament" as applicable to a devise of lands and tenements; but Coke in his commentary says: "But in law most commonly, *ultima voluntas in scriptis* is used when lands or tenements are devised, and *testamentum* when it concerneth chattels." Co. Litt. 111a.

A codicil is "an addition or supplement added unto a will or testament after the finishing of it, for the supply of something which the testator had forgotten, or to help some defect in the will": *Termes de la ley*.

Testament includes a will, codicils, etc.: *Fuller v. Hooper*, 2 Ves. Sr. 242. A deed poll executed in the presence of two witnesses who signed in the presence of the grantor and of each other, and proved by extrinsic evidence to be intended to operate after the death of the grantor, was admitted to probate: *Re Slinn* (1890), 15 P.D. 156. In *Milnes v. Foden*, 15 P.D. 105, a will and two revocable deeds poll were admitted to probate as a testament. But the document must be revocable, or it is not a will: *Simpson v. Hartman*, 27 U.C.R. 460. The true principle to be deduced from the authorities appears to be, that if there is proof, either in the paper itself or from clear evidence *dehors*, first, that it was the intention of the writer to convey



the benefits by the instrument which would be conveyed by it, if considered as a will; secondly, that death was the event that was to give effect to it, then, whatever may be its form, it may be admitted to probate as testamentary.

The Imperial Act, 1 Vict. ch. 26, sec. 1, enacts that "Will shall extend to a testament and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament, or devise of the custody and tuition of any child by virtue of 12 Car. II. ch. 24. This provision has been copied in the legislation of practically all of the English-speaking provinces of Canada. R.S.O. 1897, ch. 128, sec. 9; R.S.M. c. 146, s. 2; Wills Act, B.C. 1897, s. 2.

With the exception of the wills of soldiers and sailors, hereafter noticed, all wills must be in writing. The Statute of Frauds allowed nuncupative wills; but under the provisions of The Wills Act, 1 Vict. ch. 26, all wills must be in writing executed by the testator, and witnessed as by the Act directed. These provisions have been incorporated into the legislation of all the English-speaking provinces.

But the will may consist of one paper or of several, each apparently complete in itself, even though their provisions to some extent conflict: *Griffiths*, 2 P. & D. 457. One will may dispose of property in a foreign country; and another, of property in the country of the testator's domicile: *Harris*, 2 P. & D. 83. One will may dispose of the testator's own property; and another of his trust estates. Both are then entitled to probate as his last will and testament: *Re Reid*, 32 C.L.J. 200.

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the earlier instrument is only revoked, in the absence of express revocation, as to those parts where it is inconsistent, and both are entitled to probate: *Lemage v. Goodban*, 1 P. & D. 57; *Fenwick*, 1 P. & D. 319.

The statement that a writing is the testator's "last will" does

not effect a revocation of earlier testaments: *Petchell*, 3 P. & D. 153.

Where probate is granted of two or more testamentary papers, as together constituting the testator's last will, it is the practice to make the grant to all the executors named in the several papers: *Morgan*, 1 P. & D. 323.

A trust disposition and settlement, disposing of property under the laws of Scotland, and a will purporting to dispose of all the testator's property in England and Scotland, but ineffectual to revoke the previous settlement, may stand together as a complete testamentary disposition, and both be entitled to probate: *Donaldson*, 3 P. & D. 45.

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing together, for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate, as together containing the last will of the deceased. And if a subsequent testamentary paper be partly inconsistent with one of an earlier date, then such later instrument will revoke the former as to those parts only where they are inconsistent: *Petchell*, 3 P. & D. 153.

A will may, by reference, incorporate other existing documents, such as deeds, wills or codicils of himself or of other persons, or even papers void or invalid *per se*: *Sheldon v. Sheldon*, 3 N.C. 256. For example, where the testator by his will bequeathed property upon the same trusts, for the same purposes, and subject to the same provisions and restrictions, as were mentioned in a certain deed of settlement, such deed of settlement was proved with the will, and included in the probate: *Thos. Dickins*, 1 N.C. 399. But where the testator refers to a deed to which he was not a party, and under which he takes

no interest, the persons interested in the deed will not be compelled to produce it, for incorporation in the probate: *Sibthorpe*, 1 P. & D. 106. The following have been incorporated by reference: The will of the testatrix's father: *Emma Darby*, 4 N.C. 428. The revoked will of the testatrix's late husband: *Countess of Durham*, 1 N.C. 368. An Italian will confirming an English will: *Lord Howden*, 43 L.J. 26. One's own former will: *James Gordon Duff*, 4 N.C. 474. Unexecuted, unattested or invalid papers: *Frances Willesford*, 3 Curt. 77. A schedule or catalogue: *K. M. Bacon*, 3 N.C. 645. In *Coyle v. Coyle*, 56 L.T.N.S. 512, a book in which the testator kept accounts of advances to his children.

A testamentary paper, duly executed, in order to incorporate another, must refer to it as a written document then existing, in such terms that it may be ascertained: *Smart v. Prujean*, 6 Ves. 565. A reference in a will may be made in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as not to be applicable to any writing in particular, but the authorities seem clearly to establish that where there is a reference to any written document described as *then existing*, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it: *Allen v. Maddock*, 11 Moo. P.C., at p. 454. But to let in parol evidence to ascertain the document, the will must describe it as a document actually then in existence: *Mary Sunderland*, 1 P. & D. 198. Where there is a codicil which constitutes a republication of the will, and the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, though not in existence until after the execution of the will, is entitled to probate by force of the codicil: *Lady Truro*, 1 P. & D. 201.

An unexecuted codicil may be referred to in a later codicil so as to entitle it to be included in the probate: *Ingoldby v. Ingoldby*, 4 N.C. 493.



A will not properly executed may be referred to in a subsequent properly executed codicil, in such a manner as to make the will capable of identification, and to indicate that it is intended to be a will. The will must then be incorporated in the codicil, and the two together admitted to probate: *Allen v. Maddock*, 11 Moo. P.C. 427.

A codicil referred to a will then on deposit in a foreign country, a copy of which was stated in the codicil to be annexed thereto. The codicil confirmed the will except as altered by the codicil. The copy of the will was shewn to the witnesses and was annexed to the codicil when the latter was executed. The copy of the will was incorporated by reference in the codicil: *Mercer*, 2 P. & D. 91.

Such a general reference is sufficient as will enable the court to identify the document, when compared with the evidence produced: *Allen v. Maddock*, *ante*.

A testatrix directed certain articles to be given to such persons as she "might designate in a book or memorandum to be found with her will." The "book or memorandum" was thereby referred to as a future document, and the codicil which confirmed the will, could thereby only be taken to speak of the book as a future document, though it was, in fact, written before the codicil. The book was held not to be incorporated and could not be included in the probate: *Smart* (1902), P. 238.

A reference in a codicil to a will which had been destroyed before the execution of the codicil, will not revive the destroyed will or incorporate it in the codicil: *Reade* (1902), P. 75.

The burden of shewing that the document to be incorporated existed at the execution of the will and is identical with the document referred to in the will, rests upon those who seek to include it in the probate: *Singleton v. Tomlinson*, 3 A.C. 414.

There is no case to be found which goes the length of saying that statements made by a testator to the effect that he has executed a will, are admissible evidence in substitution for the

proper and regular evidence of the fact of the execution of the will conformably to and with the formalities required by The Wills Act: Lord Russell of Killowen in *Atkinson v. Morris* (1897), P. 40-48.

Where a testator by his will bequeathed property upon the same trusts, for the same purposes, and subject to the same provisions and restrictions as were mentioned in a certain deed of settlement, such settlement was proved with the will and included in the probate: *Thos. Dickins*, 1 N.C. 399; *Wm. Frederick Pewtner*, 4 N.C. 479.

In *Lord Keith's Case* referred to in *Sheldon v. Sheldon*, 3 N.C. 256, the testator's English property being given by him in his will upon the same trusts as his property in Scotland, and the deed of settlement being referred to in the will, was admitted to probate as part of it: *Sibthorpe*, 1 P. & D. 106.

See also: *Elizabeth Watkins*, 1 P. & D. 19; *Eyre v. Eyre* (1903), P. 131.

An invalid will was sufficiently identified by a codicil "to the last will and testament of me," written upon the same sheet as the will, it being shewn by extrinsic evidence that there was no later will than the one produced: *In the Goods of Heathcote* (1881), 6 P.D. 30.

The doctrine of incorporation has been carried to considerable length. A will witnessed by the wife of the beneficiary was confirmed by a codicil, which had the effect of incorporating and republishing the will so as to render the gift valid, notwithstanding that it was originally witnessed by the wife of the beneficiary: *Anderson v. Anderson*, 13 Eq. 381.

Oral instructions, notes of which were made by a clerk, are not incorporated in a later will which directs such instructions to be carried out: *Pascall*, 1 P. & D. 606.

A paper which neither disposes of property nor appoints an executor is not testamentary and cannot be admitted to probate.

Prior to the statutes which vest real property in the executors

(The Land Transfer Act, 1897, in England, and the Devolution of Estates Act in Ontario) a will which devised real property only, and did not appoint an executor, could not be admitted to probate. *Bootle*, 3 P. & D. 177. In *the Goods of Jane Barden*, 1 P. & D. 325, the Court held that neither the appointment of an executor nor the direction to convert the land into money was sufficient to give the Court jurisdiction.

In other cases, however, it seems to be settled that the appointment of an executor is sufficient to entitle a will which deals with real property only, to probate: *Beard v. Beard*, 3 Atk. 72; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *Brownrigg v. Pike*, 7 P.D. 61; *Elizabeth Jordan*, 1 P. & D. 555. It may be observed that a direction in a will, to convert land into money after the testator's death, does not work a conversion of the realty into personalty, and before The Devolution of Estates Act, was not sufficient to entitle the will to probate: *In the Goods of Jane Barden*, *ante*. If, however, the land was so directed to be converted into money by a settlement, that in equity it was regarded as personalty, then, though at the time the will came into effect it was still actually land, it is liable to probate and legacy duty as personalty: *In the Goods of Ann Gunn*, 9 P.D. 242.

A document bearing upon the face of it a positive assertion by the person who has executed it that it is not meant to operate as a legal will, but as a guide, is not a valid testamentary document: *Ferguson-Davie v. Ferguson-Davie*, 15 P.D. 109.

"A paper intended by the testator to go into effect after his death, if properly executed and attested, will be admitted to probate, whatever may be its form. "I have given all that I have to," etc., is sufficient: *In the Goods of Coles*, 2 P. & D. 362.

A document merely appointing a guardian is not a will: *In the Goods of Morlow*, 3 Sw. & Tr. 422. Nor is a memorandum of instruction for a will: *Fisher*, 20 L.T. 684.

A will may, however, be revoked by a writing duly executed, which is not itself a will or codicil, and is not entitled to probate: *Fraser*, 2 P. & D. 40. But see, also, *Hicks*, 1 P. & D. 606.

A letter duly executed and witnessed which indicates that it is to take effect after death, may be a valid will: *Mundy*, 2 Sw. & Tr. 119. So also two orders on a savings bank, duly witnessed: *Marsden*, 1 Sw. & Tr. 542; and a properly executed direction that "I wish my sister to have my savings bank book," it appearing from the evidence that it was intended to take effect after the death of the testator, was held to be a good will: *Cock v. Cooke*, 1 P. & D. 241.

A document, to be a will, must be revocable, and must be intended to take effect only from the death of the testator: *Robinson*, 1 P. & D. 384; *Slinn*, 15 P.D. 156; *Habighan v. Vincent*, 2 Ves. Jr. 228; *Colyer*, 15 P.D. 48.

In order to constitute a valid will (a) there must be a gift intended, (b) the document must be revocable, and (c) it must be meant to take effect after death.

The onus of shewing a testamentary intention in a document not on its face testamentary must be borne by the person claiming probate of such document: *Thornicroft v. Lashmor*, 2 Sw. & Tr. 479. The intention must have been voluntary. If the execution of the will has been procured by force, fear, fraud or undue influence, such execution is invalid, probate will be refused, and the will set aside as void.

**Joint Wills.**—Two persons may make a joint will, that is, they may both execute a document which is intended to express the testamentary intentions of each of them. Upon the death of one of them probate will be granted of so much of the joint will as became operative by such death: *In the Goods of Piazzzi Smyth* (1898), P. 7.

But where joint or mutual wills have been made in pursuance of an arrangement entered into as to the disposal of their property, by the two testators, the survivor is bound by this

implied promise that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes his property upon trust to perform the contract. By the death of the first testator, the will of the survivor becomes irrevocable. But if the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who by the death of the other party to the arrangement, has notice of the alteration, cannot in any way enforce the original bargain: *Stone v. Hoskins* (1905), P. 194.

**Language and Material of Will.**—A testamentary document must be in writing; but there is scarcely any restriction with respect to the materials on which, or by which, a will may be executed. It may be written or altered in pencil as well as in ink: *Rymes v. Clarkson*, 1 Phillim. 35.

It may be written in any language: *Foubert v. Cresseson*, Shower P.C. 194. And probate is granted of a translation of it, but upon an application to construe the will, the Court may consider whether the translation is accurate. In construing the will of a domiciled Englishman made abroad in a foreign language, the foreign language will only be looked to, to ascertain the equivalent expressions in English: *Reynolds v. Kortright*, 18 Beav. 417.



## CHAPTER III.

### COMPETENCY OF TESTATOR.

A will, in order to be entitled to probate, must have been made by a competent testator. He must be of sound mind, memory and understanding. That does not necessarily imply that the mental powers of the testator are not in any degree impaired, as, for example, by advancing years.

The burden of proving testamentary capacity on the part of the testator rests upon him who seeks to prove the will. The decree of the court must be against its validity, unless the evidence, on the whole, is sufficient to establish affirmatively that the testator was of sound mind when he executed it: *Symes v. Green*, 1 Sw. & Tr. 402.

The principle appears to be that while the burden is upon the proponent, the presumption of sanity will avail him as positive evidence in the absence of evidence shewing incompetency or casting doubt upon his mental capacity.

The fact that a man is capable of transacting business, whatever its extent or however complicated it may be, and however considerable the power of intellect it may require, does not exclude the idea of his being mentally unsound: *Smee v. Smee*, 5 P.D. 84. The contents of the testator's will may negative the contention that the delusion affected the provisions of the will, as where a liberal provision is made for those against whom a hostile delusion was claimed to exist: *Skinner v. Farquharson*, 32 S.C.R. 58.

The question of unsoundness of mind is one of degree, and it is impossible to lay down any abstract proposition of law which will guide you in determining it. Probably the mind of no person can be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is whether there is such a degree of unsoundness of mind as to

interfere with those faculties which ought to be brought into action in making a will. If you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness is required to make a will. From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons, who, by nature, or through other circumstances, may be supposed to have claims upon the testator's bounty, and the power of considering these several claims, and of determining in what proportion the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will: *Burdett v. Thompson*, 3 P. & D. 72 (note).

An idiot is one whose mind has from infancy been so unduly feeble as to be *non compos mentis*. An idiot cannot make a will.

A lunatic whose mind is generally diseased so that he has delusions on multifarious matters, is incapable of making a will.

The chief difficulties in regard to testamentary capacity arise where the testator's mind is partly unsound, so that he has insane delusions relating to one or more subjects, but on everything else seems rational and sound.

A delusion has been defined as a false belief originating spontaneously in the imagination, without foundation, either in fact or in evidence, of the falsity of which the deluded person cannot be convinced by evidence or proof.

The principles which govern the validity of wills, notwithstanding some degree of mental impairment, are indicated in the following cases.

Old age, though there is impairment of the mental faculties by which the mind has become in some degree debilitated and the memory in some degree enfeebled, does not prevent the testator from making a valid will, if he is capable of recollecting the pro-



perty he is about to bequeath, the manner of distributing it, and the objects of his bounty: *Banks v. Goodfellow*, 5 Q.B. 549.

Nor does great physical weakness accompanied by some degree of mental weakness, the testator being *compos mentis*: *Martin v. Martin*, 15 Gr. 586; *Thompson v. Torrance*, 9 A.R. 1; *McLaughlin v. McLellan*, 26 S.C.R. 646; *Eames v. Eames*, 11 Gr. 325.

In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property. The protection of the law is in no case more needed than where the mind has been too much enfeebled to comprehend more objects than one, and especially when that one object may be so forced upon the attention of an invalid as to shut out all others that might require consideration: *Harwood v. Barker*, 3 Moo. P.C. 282; *Brown v. Bruce*, 19 U.C.R. 35. It is not sufficient that the testator be of memory to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such memory as the law calls sane and perfect memory: *Marquis of Winchester's Case*, 6 Co. 23a; *Menzies v. White*, 9 Gr. 574.

Insane delusions which may affect the disposition of his property by the testator, will render the will void. For example, a delusion which causes abnormal repulsion towards a child: *Boughton v. Knight*, 3 P. & D. 64. If the delusion could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him, and the manner in which he should dispose of his property, then the presence of a particular delusion would not incapacitate him from making a will. The burden of proof, however,

rests upon those who set up the will, and when it is made to appear that there was in some particular unsoundness of mind, that burden is considerably increased: *Smee v. Smee*, 5 P.D. 84; *Skinner v. Farquharson*, 32 S.C.R. 58.

No doubt where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection, and the claims of near relationship have been disregarded. But where, in the result, a jury are satisfied that the delusion has not affected the general faculties of the mind and can have no effect upon the will, we see no sufficient reason why the testator should have been held to have lost his right to make a will, or why a will made under such circumstances should not be upheld: *Banks v. Goodfellow*, 5 Q.B. 543, cited in *Ingoldsby v. Ingoldsby*, 20 Gr., p. 141. The case of *Waterhouse v. Lee*, 10 Gr. 176, deals with a will made in a short lucid interval, and discusses at length the principles to be applied in regard to the evidence necessary to establish such a will.

In *Jenkins v. Morris*, 14 Ch. D. 674, it was expressly held that the decision in *Banks v. Goodfellow*, followed in *Boughton v. Knight* and *Smee v. Smee*, had overruled *Waring v. Waring*, 6 Moo. P.C. 341, in which it was thought that, as the mind is one and the same, we are wrong in speaking of partial unsoundness, and, if a testator has delusions on any point, he is devoid of testamentary capacity. If, however, instructions were given where

the testator was of sound mind and memory, the will may stand, though at the time of its execution he was too ill to remember the details, if he remembers that he gave the instructions and assumes that the will is prepared in accordance with these instructions: *Parker v. Filgate*, 8 P.D. 171. Approved in *Perera v. Perera* (1901), A.C. 354; and followed in *Kaulbach v. Archbold*, 31 S.C.R. 387.

Where there are insane delusions in the testator's mind regarding one member of his family, who for that cause is unfavourably dealt with, the will is invalid not merely in reference to the provision made for that one child, but throughout: *Bell v. Lee*, 28 Gr. 150.

The presumption is that every person is sane until the contrary is proved, and it lies on him who seeks to impeach a will on the ground of the incompetency of the testator to establish the lack of competency. If, however, there is conflicting evidence of sanity on the one hand, and insanity on the other, the Court ought to be satisfied that the will is that of a competent testator, and the onus in such case lies on him who propounds the will: *Sutton v. Sadler*, 3 C.B. N.S. 87.

But a will made in a lucid interval by one ordinarily *non compos mentis* is good. The burden of proving that the will was made in a lucid interval is on him who propounds the will for probate. The incompetency or insanity once proved is presumed to continue until the contrary is shewn: *Cartwright v. Cartwright*, 1 Phill. 90. The evidence must be sufficient to shew a restoration of the faculties of the mind sufficient to enable the party making the will soundly to judge of the nature of the act: *Atty.-General v. Parnter*, 3 Bro. C.C. 441. The rationality or otherwise of the will itself may be a guide to the condition of the testator's mind at the time of the execution of the will: *Scruby v. Fordham*, 1 Add. 70.

A drunkard during the time of his drunkenness, if it is so

extreme as to deprive him of his reason and understanding, cannot make a valid will: *Ayrey v. Hill*, 2 Add. 210.

Under section 7 of The Wills Act, 1837, R.S.O. 1897, ch. 128, sec. 11, an infant cannot make a will which would come within the provisions of the Act: *Re Murray Canal, Lawson v. Powers*, 6 O.R. 685. But nuncupative wills, in the few cases in which they may still be made, that is, by a soldier being in actual military service or by a mariner or seaman being at sea, not being within the Act, may be made by infants: *Hiscock* (1901), P. 78; *McMurdo*, 1 P. & D. 540. Such wills are expressly excepted from the operation of the statute. The Wills Act, sec. 11; R.S.O. 1897, ch. 128, sec. 14.

A blind person or a deaf and dumb person may make a will, provided that it can be established that he knew and approved of its contents: *Moore v. Paine*, 2 Ca. Temp. Lec. 595; *Edwards v. Fincham*, 4 Moo. P.C. 198. In the last case a will executed by a blind testatrix, was established, though it had not been read over to her before execution, it appearing by evidence that it was in accordance with the instructions which she had given.

Letters probate when granted are only *primâ facie* evidence of testamentary capacity, even since The Devolution of Estates Act, as to real property, and want of testamentary capacity may, notwithstanding probate, be shewn in a contest relating to the title to the land: *Sproule v. Watson*, 23 A.R. 692.

Before The Wills Act, 1837, a married woman was, as a general rule, incapable of making a will. Her will of land was declared void by statute. Her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eyes of the law the wife had no existence separate from her husband, and no separate disposing or contracting power. On the general rule some modifications were engrafted. A married woman who was an executrix had, as such, power to make a will and to appoint an executor for the purpose of continuing the representation to the original



testator; a married woman might make a will on the consent of her husband; a married woman might make a will in the exercise of a power; and a married woman might make a valid will disposing of her separate estate or its savings: *Willock v. Noble*, 7 Eng. & Ir. App., p. 589.

The separate estates referred to in this judgment are no doubt such separate estates as are discussed in *Taylor v. Meads*, 4 DeG. J. & S. 597, in which case the estate given to the married woman was "the equitable estate in fee, with a declaration, the effect of which is, that her husband shall have no interest in the estate so devised [as against the wife], nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman"; and also in *Cooper v. McDonald*, 7 Ch. D. 288, in which the married woman was equitable tenant in tail to her separate use of certain freehold estates, the rents and profits of which she could not alienate or anticipate, and in which, the entail being barred, she acquired an equitable fee, which it was held she had power to devise by will so as to defeat her husband's right to curtesy. See also *Smith v. Smith*, 5 O.R. 690.

Property given to the sole and separate use of a wife, was subject to the wife's sole and separate right of disposal: *Fettiplace v. Gorges* (1789), 1 Ves. Jun. 46. Property bequeathed upon trust for the separate use of a married woman, might without any reference to a will in the instrument creating the trust, be disposed of by the will of the married woman without the assent of her husband; as to other property she could not make a will without his assent: *Rich v. Cockell*, 9 Ves. 369. The wife had also the power of disposition by will of her savings out of her separate property: 1 Eq. Ca. Abr. 66, 68.

The married woman acquired no enlarged capacity from the Wills Act, though her testamentary instrument, when made, would under the statute have the benefit of more liberal rules of interpretation: *Thomas v. Jones*, 1 DeG. J. & S. 82.

From and after the fourth day of May, 1859, the Consolidated Statute of Upper Canada, ch. 73, sec. 16, enacted that a married woman might by will executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, whether acquired before or after her marriage, to or among her children, if any, and if no children then to her husband, but the husband's rights as tenant by the curtesy were not to be affected. If there were children she could not devise to the husband as to others: *Mitchell v. Weir*, 19 Gr. 568. It was even held that she could not devise separate property to one child to the exclusion of others: *Munro v. Smart*, 26 G. 37, reversed on other grounds: 4 A.R. 449. The devise of her separate property, if otherwise good, was not rendered invalid by her husband having been in possession of it before the Consolidated Statute came into force: *Re Hillker*, 3 Ch. Ch. 72.

The Married Woman's Property Act, makes all property real and personal, acquired by a married woman, since it came into operation on the 1st day of July, 1884, her separate property. Section 3 of the Act enacts that "a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee." This section is the enactment in Ontario of the English Married Women's Property Act, 1882, sec. 1, sub-sec. 1. See *Re Cuno*, 43 Ch. D. 12; *Reid v. Reid*, 31 Ch. D. 402.

It may be noted that by The Wills Act, R.S.O. 1897, ch. 128, sec. 9(5), "person" and "testator" include a married woman. This clause was in the revision of 1877, but was omitted from the revision of 1887, and was again included in 1897.

Formerly Rule 15, made under The Court of Probate Act, 1857, as amended in 1858, required that in granting probate of a married woman's will made by virtue of a power, the power under which the will purports to be made had to be specified

in the grant. This rule was rescinded and the following was substituted to comply with the change in the law:—

In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same, the separate personal estate of the testatrix, or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with the will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with the will annexed without any exception or limitation, and issue to an executor or other person authorized in the usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy: Rule 15 and 18 of 1887.

An Indian may make a will, and may by such will dispose of any lands or goods or chattels, except in so far as such right may be interfered with by statute: *Johnson v. Jones*, 26 O.R. 109. "I am assuming and not questioning the right of the Dominion Parliament to control the distribution of the goods and chattels belonging to the estate of a deceased Indian, and the power of the Court to consider the question here raised, notwithstanding the granting of probate." *Ib.* The Indian Act, R.S.C., ch. 43, sec. 20, and the amendment, subsequently made thereto, confer the right upon Indians, subject to certain restrictions prescribed thereby, to devise their lands, and bequeath their chattels by will, and prescribe the succession to such property in case of intestacy.

The capacity of a testator as, for instance, in regard to coverture, infancy, etc., so far as regards personal property must be governed by the law of the domicile. The capacity of a testator as regards infancy, coverture, etc., as well as the sufficiency of his will to pass personal property, must be determined wholly by the law of his domicile regardless of the situation of the property.



## CHAPTER IV.

### UNDUE INFLUENCE, COERCION, ETC.

A will, the making of which has been procured by undue influence, will be set aside by the High Court of Justice as a nullity, and probate of such a will must be refused. What constitutes undue influence is a question of importance, and at times it gives rise to considerable difficulty. Influence may be degrading and pernicious, and yet not be undue influence in the eye of the law. In a popular sense we often speak of one person as exercising an influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property, provided only that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud. Influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or fraud. But to prove that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him

execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion.

So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows that he has thus formed to their disadvantage, may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they may range themselves under one or other of these heads—coercion or fraud. Where a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed: *Boyse v. Rossborough* (1856), 6 H.L.C. 2, The judgment of Lord Chancellor Cranworth in that case is the leading authority on the subject. In *Wingrove v. Wingrove* (1885), 11 P.D. 81, Sir James Hannen uses similar language. For example, a young man in the toils of a designing woman, or led astray by a profligate companion, may under such influences persuade himself to leave his property to his mistress or his evil companion. However shocking such a case may be, the will is not the result of undue influence. To be undue influence in the eye of the law, there must be, to sum it up in a word—coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. If the act is the result

of the wish and will of the testator—in the absence of fraud—it is not undue influence. It is not sufficient to shew that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will, such as it is, has been produced. In *Baudains v. Richardson* (1906), A.C. 169, the authorities are reviewed, the last two cases are cited, quoted from, and approved.

The rule applicable to a gift *inter vivos* is wholly different from that governing in the case of a will. In equity persons standing in fiduciary relations, as parent and child, husband and wife, physician and patient, solicitor and client, confessor and penitent, guardian and ward, are obliged, in order to retain a gift to shew that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence. But the influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos* it is considered by the Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to benefit themselves, is an undue influence, and gifts or contracts brought about by it are therefore set aside, unless the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The natural influence of the parent or guardian over the child, as the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent. Undue influence, to set aside a will, must amount to force and coercion destroying free agency; further there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done for the

sake of peace, so that the motive was tantamount to force and fear: *Parfitt v. Lawless*, 2 P. & D. 462.

It is not sufficient to shew that the facts attendant upon the execution of the will are consistent with undue influence. It must be shewn that they are inconsistent with the contrary hypothesis: *Adams v. McBeath*, 27 S.C.R. 13. See also *Kaulbach v. Archbold*, 31 S.C.R. 387.

Lord Penzance in *Hall v. Hall*, 1 P. & D. 482, gave the following directions to the jury: "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, these are all legitimate, and may be fairly pressed upon a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition and not the record of some one's else."

## CHAPTER V.

### FRAUD.

Fraud and imposition upon weakness is a sufficient ground upon which to set aside a will of real, much more of personal, estate: *Lord Donegal's Case*, 2 Ves. Sen. 408.

If the withholding of benefits under the will of a testator is produced by false and fraudulent representations made to the testator respecting the character and conduct of the claimant upon his bounty, from whom they are thereby withheld, the testator becoming the victim of such calumny by reason of the impairment of his faculties through age and disease, such fraud is a sufficient ground for refusing probate. "If a testator be circumvented by fraud the testament loseth its force." There cannot be a stronger instance of fraud than false representation made to an old man, for the purpose of inducing him to revoke a bequest to the person so caluminated: *Allen v. McPherson*, 1 H.L.C. 207. Sir H. J. Fust, who was consulted in that case, expressed himself thus: "If it should appear, as in the case stated by your Lordships, that an old and infirm testator who had bequeathed a legacy to A.B., had been induced by false and fraudulent representation with reference to the conduct of A.B., made to him for the purpose by C.D., to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the residue to C.D. than he otherwise would take, I conceive that the Ecclesiastical Courts would not under such circumstances grant probate of such revoking codicil, provided that it should be clearly established in point of evidence that such act and intention were produced by such false and fraudulent representations."

If, however, probate had been granted by the Ecclesiastical Court, it could not be set aside in Equity, as that would imply



that an appeal lay to the Court of Chancery from the Ecclesiastical Court: *Ib.*

If a will is made in answer to interrogatories it is valid; but the circumstances are scrutinized with greater care to guard against undue influence, lack of capacity or absence of volition.

In *Thompson v. Torrance*, 28 Gr. 253, 9 A.R. 1, it is said that in such a case the Court is more strict in requiring evidence of spontaneity and volition than in an ordinary case. In *Freeman v. Freeman*, 19 O.R. 141, it was declared that what was done by drawing the will of the testator, a very old man suffering from extreme physical and mental prostration, in the condition in which he then was, without a word of instruction from the testator, containing a devise of the whole of the testator's estate, without bringing home to his mind (were he capable of being made to understand) the effect of his testamentary act, amounted to a greater or less degree of fraud on the part of the person who prepared the will, and of those who were present and taking benefits under the will the testator was asked to execute.

Failure to bring home to the mind of the testator the nature of his testamentary act, may amount to fraud on the part of those who prepare the will, if they take a benefit under it. Those who have been instrumental in preparing or obtaining a will, have thrown upon them the onus of shewing the righteousness of the transaction. If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. It would seem that, in such a case, there is no fixed rule of law that if you find the testator to be of sound mind, memory and understanding, and that the will was read over to him, you must at once assume that he was aware of the



contents of the will: *Fulton v. Andrews*, 7 H.L.C. 448. See also *Donaldson v. Donaldson*, 12 Gr. 431; *Hogg v. McGuire*, 11 A.R. 507.

In *Riding v. Hawkins*, 14 P.D. 56, the trial judge after the cross-examination of the defendant, upon whom the burden of proof lay in the case, allowed the plaintiff to amend the pleadings by adding an allegation of fraud by reason of misrepresentations made by him to the testatrix about her daughter and her family. The jury found that the codicil in question was obtained by fraud and it was set aside, but a new trial was granted on the ground of surprise.

## CHAPTER VI.

### TESTATOR'S KNOWLEDGE OF CONTENTS OF WILL.

Upon principle and authority it is necessary to the validity of a will that the testator, at the time of its execution, should know and approve of its contents: *Hastilow v. Stobie*, 1 P. & D. 64.

In *Guardhouse v. Blackburn*, 1 P. & D. 116, it is said that after much consideration the following propositions commend themselves to the Court as rules which since the statute (Wills Act, 1837), ought to govern its action in respect of a duly executed paper: “*First*, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time that he signed it. *Secondly*, that, except in certain cases where suspicion attaches to the document, the fact of the testator’s execution is sufficient proof that he knew and approved the contents. *Thirdly*, that although the testator knew and approved the contents, the paper may still be rejected, on proof, establishing beyond all possibility of mistake, that he did not intend the paper to operate as a will. *Fourthly*, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining execution thereof. *Fifthly*, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. *Sixthly*, that the above rules apply equally to a portion of the will as to the whole.”

“That the testator did know and approve of the contents of the alleged will, is part of the burden of proof assumed by every one who propounds it as a will. The burden is satisfied *primâ facie*, in the case of a competent testator, by proving that he executed it. But if those who oppose it succeed, by a cross-examination of the witnesses, or otherwise, in meeting the *primâ facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate”: *Cleare v. Cleare*, 1 P. & D. 658.

The presumption of knowledge and approval from the fact that the testator had read the will and executed it, was put even more strongly in several later cases, which were reviewed when the question came up for consideration in the House of Lords in *Fulton v. Andrews*, 7 Eng. & Ir. App. 448. The gist of the decision in that case seems to be to deprecate the introduction of fixed and unyielding rules of law which are not imposed by any statute, and to declare that there is no unyielding rule of law, especially where fraud is an ingredient in the case, that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further inquiry is shut out. The jury, in answer to questions, had found the testator of sound mind, memory and understanding, that he knew and approved of the contents of the will, which had been read over to him before execution, but that he did not know and approve the contents of the residuary clause. This clause had not been in the instructions, the will was in the handwriting of one of the residuary legatees, the residuary legatees were also executors, they propounded the will, but they were not in any way related to the testator. It was admitted that though the will was left with the testator for a day or two before its execution, his attention was not, at the moment of its execution, called to the discrepancy between the will and the instructions. The Court of Probate, notwithstanding the finding of the jury in regard to the residuary clause, upon the return

of a rule *nisi*, granted probate of the whole will, apparently upon the view that it was a fixed and unyielding rule of law that when a testator who is of sound mind, memory and understanding has his will read over to him, or reads it over and executes it, it must be assumed that he knew its contents, and that no evidence could be received against the presumption. The House of Lords set aside the judgment of the Court of Probate, and directed probate with the omission of the residuary clause. Lord Cairns in his judgment, speaking of the rules laid down by Lord Penzance in *Guardhouse v. Blackburn*, cited *ante*, said: "Even if these rules, laid down in this way by Lord Penzance, are to be accepted as rules which should be applied to the case of every testamentary instrument, still, with regard to the present case, they do not carry, to my mind, any persuasion that there was a non-direction, on the part of the learned Judge who tried the cause, in a matter which he ought to have laid before the jury. It appears to me that, consistently with the rules mentioned by Lord Penzance, the jurors may not have been satisfied that there was a proper reading of the will to the testator, or may have been satisfied, after hearing all the facts submitted to them by Mr. Justice Mellor (before whom the issues directed by the Court of Probate were tried with a jury), that there was on the part of those who propounded the will such a failure of duty on their part, as amounted to that degree of fraud to which Lord Penzance refers in the rules I have mentioned." He also cited and quoted with approval from *Barry v. Butlin*, 2 Moo. P.C. 480, two rules; the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and

it is judicially satisfied that the paper propounded does express the true will of the deceased.”

The benefit which gives rise to the second rule laid down in *Barry v. Butlin* must be a substantial one, and a small bequest, or one made to the draftsman in common with others of a class to which he belonged and which, owing to his relationship to the testator, he might naturally expect, would not necessarily give rise to the onus mentioned in the rule.

In a case where the evidence of the will having been read over to the testator at the time of its execution is conflicting, the fact that he lived for a number of years after without revoking or altering it satisfies the onus on the person who prepared the will and took a benefit under it, to establish that the testator knew and approved of the contents: *Connell v. Connell*, 37 S.C.R. 404. The same question was fully considered by the Court in *The British and Foreign Bible Society v. Tupper*, 37 S.C.R. 100.



## CHAPTER VII.

### THE EXECUTION OF A WILL, AS TO TIME AND DOMICILE.

To the end that a will may be admitted to probate, it must be executed in accordance with the requirements of the law. Before The Wills Act, 1 Vict. ch. 26 (Imp.), no formalities of any kind were necessary for the making of a will of personal property. The nineteenth section of the Statute of Frauds (29 Car. II. ch. 3) required wills of personalty, except in the case of "any soldier being in actual military service, or any mariner or seaman being at sea," to be reduced into writing in the testator's lifetime, where the estate passing under the will exceeded the value of £30. But attestation was unnecessary. Under the 5th section of the same Act all devises and bequests of lands or tenements were required to be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, attested and subscribed in the presence of the devisor by three or four credible witnesses. This, however, did not extend to personal property.

Prior to the Statute of Frauds a nuncupative testament of personal property was of as great force and effect as if made in writing. A nuncupative testament is where the testator, without any writing, doth declare his will before a sufficient number of witnesses. The essence of such a will was that the testator should name his executors and declare his whole mind before witnesses.

The effect of a gift, before 25 Geo. II. ch. 6, to a witness to a will, or to the husband or wife of a witness, was to render the witness incompetent, and to make the will void in so far as it affected real property. A "credible" witness means a witness not incapacitated by mental imbecility, interest or crime. By that statute the devise to the witness was rendered inoperative, and the witness was made competent. This enactment did not



extend to the husband or wife of a witness, and a devise of land to the husband or wife of a witness continued to render the will invalid by reason of the incompetency of the witness. This statute only extended to real property, and then only to a direct and not to a consequential interest therein: *Halfield v. Thorp*, 5 B. & Al. 589. Where the gift was of personalty the statute did not apply: *Emanuel v. Constable*, 3 Russ. 436, following *Brett v. Brett*, 3 Add. 210, and disapproving the contrary view in *Lees v. Summersgill*, 17 Ves. 508. To the same effect is *Foster v. Banbury*, 3 Sim. 40. See also *Ryan v. Devereux*, 26 U.C.R. 100; *Re Munsie*, 10 P.R. 98.

Any will of lands executed after the sixth day of March, 1834, and before the first day of January, 1874, in Ontario, passed after acquired land, as well as that owned by the testator at the time of the execution of the will; it passed the testator's whole estate therein, unless a contrary intention appeared on the face of the will, though no words of inheritance were used; and was as valid and effectual to pass land, when executed in the presence of and attested by two witnesses, as if executed in the presence of and attested by three witnesses; and it was sufficient if the witnesses subscribed their names in presence of the testator, although their names were not subscribed in the presence of each other: The Wills Act of Ontario, secs. 2-6.

Before The Wills Act, 1837, in England, no matter how expressly the testator's intention was declared, no will was operative to pass real property acquired after the execution or re-publication of the will. The manifest intention of the testator was thus often defeated, unless his will was republished with all the solemnities required for its execution by the Statute of Frauds; and any alteration in the character of the estate was a revocation.

It was otherwise with personal property, for if the words used by the testator were sufficiently comprehensive to manifest that intention, the personal property acquired after the execution

of the will would pass under it. All the more important provisions of The Wills Act, 1837, were brought into operation in Ontario on the first day of January, 1874. Consequently, many of the decisions in regard to the execution and effect of wills in England prior to the first day of January, 1838, are applicable in this province until 1874.

The rules and orders made in England under The Court of Probate Act in regard to wills made before 1838, declared the law as it formerly stood, and are still applicable to wills executed in Ontario before 1874, as regards personalty, of which alone probate was then granted; they indicate the procedure in regard to wills of personalty to which the Statute of Frauds was applicable. They are as follows:—

17. It is not necessary that a will, codicil or testamentary paper dated before January 1st, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may, nevertheless, be valid; but in such cases the testator's intention that it should operate as his will, codicil or testamentary disposition must be clearly proved by circumstances.

18. A will, codicil or testamentary paper, signed at the end of it by the testator, and attested by two disinterested witnesses, although there be no clause of attestation, is entitled to probate.

19. In cases where a will, codicil or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to the paper in the presence of one attesting witness, or produced it with his name already subscribed, or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil or testamentary disposition, or otherwise notified his intention that it should operate as such.

20. If the will, codicil or testamentary paper is signed at the end of it by the testator, but is unattested, and there is nothing to shew an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

21. If the will, codicil or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to shew the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

22. Rule 22 declared the incompetency of an executor named in the will as a witness to the execution, unless he had first divested himself of his rights as executor.

23. If an attestation clause, or the word "witnesses," appears written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must *primâ facie* be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

24. Any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of a paper on the part of the testator, must be accounted for.

25. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death, may, under circumstances,

suffice. Alterations and interlineations made since the 31st of December, 1837, are subject to the provisions of 1 Vict. ch. 26.

The provisions of the Statute of Frauds as to "devises and bequests of any lands or tenements" were not repealed by 4 Wm. IV. ch. 1, sec. 51. The number of witnesses may, by this Act, be reduced to two, but they might still subscribe in the presence of the testator, though not in the presence of each other, which sufficed under the Statute of Frauds, or in the presence of each other, though not in the presence of the testator, as required by section 51 of 4 Wm. IV. ch. 1. The modes of execution were held to be alternative: *Crawford v. Curragh*, 15 C.P. 55; *Ryan v. Devereux*, 26 U.C.R. 100. The change in the law of evidence made by The Evidence Act (U.C.), 1852, which in a civil action removed the incompetency of a witness by reason of interest, did not affect the execution of wills containing devises of land: *Crawford v. Boyd*, 22 Gr. 398.

After conflicting decisions it is settled that the provisions of 25 Geo. II. ch. 6, did not apply to wills of mere personal estate which were, before The Wills Act (1837), valid without the attestation of any witnesses, but only to such wills and codicils as were required by the Statute of Frauds to be attested: *Emanuel v. Constable*, 3 Russ. 436; *Brett v. Brett*, 3 Add. 210; *Hopkins v. Hopkins*, 3 O.R. 223.

The requirements of the Statute of Frauds, as modified after the sixth day of March, 1834, in regard to devises of land in Ontario, and as regards bequests of personalty before January 1st, 1874, have been discussed in numerous cases. A witness under that statute to be "credible" must be disinterested. Before 25 Geo. II. ch. 6, which voided the devise to a witness to its execution, and made the witness competent, a will which gave lands to a witness to its execution, was void. Even after the last mentioned statute, a devise to the husband or wife of a witness rendered the will void, for such witness was interested and therefore not "credible," and 25 Geo. ch. 6, was confined to devises to the witness himself or herself, and did not apply to devises to his or



her spouse. The statute which in Ontario after March 6th, 1834, allowed a will of lands to be attested by two instead of three witnesses, did not change their character; they had still to be credible: *Ryan v. Devereaux*, 26 U.C.R. 100.

The rule is that the law of the country in which the testator is domiciled at the time of his death, governs the execution and interpretation of his will, so far as it affects personal property, and that, too, regardless of the place of his birth or death, or the situation of the property at the time. All questions of testacy and intestacy, of the next of kin, and of the interpretation and construction of the will must be determined by the law of the domicile: *Enohin v. Wylie*, 10 H.L.C. 1; *Doglioni v. Crispin*, L.R. 1 H.L. 300. Although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which he was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and to ascertain, as best they may, who, according to the law of the domicile, are entitled to the estate, they will follow the adjudication of the Courts of the domicile, in so far as they have determined the questions at issue: *Re Trufort*, 36 Ch. D. 600. The rule is to adopt the law of the domicile as it was at the time of the death, and it does not undertake to adopt and give effect to all retrospective changes that the legislature of the foreign country may make in that law: *Lynch v. Government of Paraguay*, 2 P. & D. 268.

If a man die domiciled here, debts due to him abroad, and his personal effects in foreign countries, must be distributed according to the law of this country: *Thorne v. Watkins*, 2 Ves. Sr. 35. But if he be domiciled abroad and die here, his personal property here must be distributed according to the laws of the country where he was so domiciled. The *situs* of the property must, however, regulate the jurisdiction to grant probate or administration: *Campbell v. Beaufoy*, Johns. 326; *Ewing v. Orr-Ewing*, 10 A.C. 453.



Real property and chattels real are quite otherwise. The law of the country in which the property is situated must govern all questions as to the validity, construction, and interpretation of the will, kinship and the descent of the property, regardless of the domicile of the deceased owner at the time of his death. Thus the disposition of an English leasehold is governed by the law of England, regardless of the law of the testator's domicile: *Freke v. Lord Carbery*, 16 Eq. 461; *Re Gentili*, Ir. Rep. 9 Eq. 541; *Pepin v. Bruyere* (1902), 1 Ch. 24. A leasehold interest in land is, for the purpose of testamentary disposition, a chattel interest in land, and must be treated as immoveable property and must follow the law of the place where the land is situate: *Ib.* A foreigner's will may therefore be valid as to real property and chattels real, and invalid as to personalty, or *vice versa*: *De Fogassieras v. Duport*, 11 L.R. Ir. 123; *Duncan v. Lawson*, 41 Ch. D. 394.

Domicile has been variously defined. "Habitation (by a person) in a place with the intention of remaining there forever, unless some circumstance should occur to alter his intention: *Whicker v. Hume*, 7 H.L.C. 164. A man's domicile is, *primâ facie*, the place of his residence; but this may be rebutted by shewing that such residence is constrained from the necessity of his affairs, or transitory: *Bempde v. Johnstone*, 3 Ves. Jr. 201. It is always material, in determining what is a man's domicile, to consider where his wife and children live and have their permanent place of residence and where his establishment is kept up: *Platt v. Attorney-General of New South Wales*, 3 A.C. 336. "Domicile of choice is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief

from illness, and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation": *Udny v. Udny*, L.R. 1 H.L. Sc. 458. The question of domicile is one of residence and not of citizenship: *Haldane v. Eckford*, L.R. 8 Eq. 631.

The abandonment of an acquired domicile, *ipso facto*, restores the domicile of origin: *King v. Foxwell*, 3 Ch. D. 518.

A person can have but one domicile for the purpose of inheritance. That domicile is either the domicile of origin or the domicile of choice.

The domicile of origin is that of the father at the time of the child's birth. An illegitimate child takes the domicile of the mother. The domicile of origin continues until the person has, in intention and in fact, acquired a permanent home elsewhere. The country in which he has acquired such a home is his domicile of choice. He may abandon that country as his home. When he does so, until he has, *animo et facto*, acquired a permanent home elsewhere, he again becomes domiciled in the country of his origin: *Somerville v. Somerville*, 5 Ves. 751; *Bell v. Kennedy*, L.R. 1 H.L. Sc. 307; *Udny v. Udny*, L.R. 1 H.L. Sc. 441; *Ennis v. Smith*, 14 How. 400.

A will in order to be admitted to probate must, so far as personalty is concerned, be executed according to the law of the domicile.

So far as it affects real property and chattels real, it must be executed in accordance with the *lex loci rei sitæ*.

The English Wills Act, 24 & 25 Vict. ch. 114, make somewhat more liberal provisions in regard to the execution of wills out of England than formerly prevailed. The English Act provides that every will made out of the United Kingdom by a British subject, whatever his domicile at the time of making it, or at the time of his death, shall so far as regards personalty in England, including leaseholds, be well executed if made in accordance with the law of the country in which it is made, or of the place where the testator is then domiciled, or of his domicile of

origin. If made in the United Kingdom it will be good, if made according to the law of that part of the United Kingdom where it is made. For example, a British subject making his will in Italy may make it according to the forms required by Italian law, or according to those of England. If he go on a visit to Austria he may make his will with the formalities required by Austrian law. But this statute only applies to the probate in the United Kingdom of wills of British subjects.

This enactment has been incorporated into the statute law of Ontario by The Wills Act (Ont.) of 1902.

The rights of a person appointed representative of a deceased person domiciled within the jurisdiction of the Court, are not limited to the goods within such jurisdiction, but extend to the personal property wherever situated. In order, however, to obtain control of personal property outside the territory within which the laws of the legislature under which the representation was given, have force, representation must be secured from the Courts of other provinces or countries where such property chances to be. Otherwise it cannot be reduced into possession.

An executor cannot sue in one country or province or give a valid acquittance for debts by reason of probate or administration obtained in another country or province.

*Mobilia sequuntur personam* is a principle of international comity, and the distribution of personal property, whether under a will or upon an intestacy, amongst those entitled, must be determined by the law of the deceased person's domicile. But effect can be given to it only through a representative appointed by the proper Court of the country or province in which the personal property is situated. A foreign grant of letters probate or of administration would give no right to assets in this country.

“Personal property in this country belonging to a foreigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, administration will be granted here, limited to the personal estate in this country. If

he has left a will, valid by the law of his domicile, and has thereby appointed executors, probate of that will must be obtained here. In every case the succession to personal property will be regulated, not according to the law of this country, but to that of the domicile': *Enohin v. Wylie* (1862), 10 H.L.C., at p. 19.

But until probate or administration is granted in the country or province where the goods are, the foreign executor or administrator has no dominion over them. Thus probate of a will granted to an executor by the Court of Canterbury gives him no right to sue in Ontario: *White v. Hunter*, 1 U.C.R. 452. So, too, when a foreign testator died possessed of mortgages on land in Ontario, the administrator appointed in the country of his domicile has no power to discharge the mortgage until he obtains administration here: *Re Thorpe*, 15 Gr. 76; *Cutter v. Davenport*, 1 Pick. 81. A judgment against a foreign administrator will not support an execution against the lands of the deceased person: *Grant v. McDonald*, 8 Gr. 468.

If the will of the deceased person has been formally recognized and acted on by the Courts of competent jurisdiction in the country of the testator's domicile at the time of his death, and has not been since questioned in that country, the Courts of this country will not allow the validity of such will to be litigated before them: *Miller v. James*, 3 P. & D. 4.

Before granting probate of a foreign will the Court will require to be satisfied of one of two things, either that the will is valid by the law of the country where the testator is domiciled, which can be proved by the affidavit of an expert in that law, or that a Court of that foreign country has acted upon it and given it efficiency: *Deshais*, 4 Sw. & Tr. 14.

If the original will is retained in the possession of the foreign Court, probate may be granted here on the production of an exemplification under the seal of the foreign Court, if it



has a seal. Copies of wills to be proved must, as a rule, be certified by the Court or official having the custody of the original.

It is a general rule that when a person dies domiciled in a foreign country, and the Court of that country invests anybody, no matter whom, with the right to administer the estate, the Courts of this country ought to follow the grant, simply because it is the grant of a foreign Court, without investigating the grounds on which it is made, and without reference to the principles on which grants are made in this country: *Smith*, 16 W.R. 1130; *In re Medbury, Lothrop v. Medbury*, 11 O.L.R. 429.

When the deceased person is domiciled in a foreign country, and the Courts of the country of the domicile make a grant of representation to a resident of that country, then upon his satisfying the courts of this country that he has been authorized by the proper Courts of his own country to administer the estate of the deceased, the Courts of this country will without further consideration grant him the right to administer the assets in this country: *Hill*, 2 P. & D. 89.

The appointment of a creditor as administrator is not as of right, but one resting in the discretion of the Judge who appoints. If the law of the domicile gives the next of kin priority over creditors in seeking administration, and a creditor has obtained administration from the Courts of the domicile without the citation of the next of kin, the latter will be preferred in the courts of Ontario when administration is sought of the assets within its limits. The administration of personal property is governed by the law of the *situs*, though the succession is governed by the law of the domicile: *Re O'Brien*, 3 O.R. 326, following *Browne v. Phillips* (1739), referred to in *Burn v. Cole*, Ambler 415. In that case administration was granted in England to a creditor, the attorney of the creditor applied in Jamaica; was refused; and upon appeal to the King in Council, the sentence was affirmed on the ground that, none of the kin having applied, it was discretionary in the Judge to grant administration to a creditor. On the other hand in *Williams v.* ———



(1747), cited in *Burn v. Cole*, ante, administration having been granted in England to the widow, the deceased having resided and died there, a grant was made in Jamaica to the sister, and the widow's application refused. On appeal to the King in Council, judgment reversed.

But if the grant by the forum of the domicile is made, not to a person who is entitled, as the widow, but to a nominee of the person entitled, such nominee will not be granted probate here without the consent of the person actually entitled. If the foreign law is to be followed the courts here would; as was the case in the courts of the domicile, require the consent of the person entitled before making such a grant: *Weaver*, 36 L. J. P. & M. 41.

It may be observed that upon marriage the wife takes the domicile of the husband as her domicile. Even supposing him to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that account acquire another domicile for herself: *Yelverton v. Yelverton*, 1 Sw. & Tr. 574, following the leading case: *Dolphin v. Robins* (1859), 7 H.L.C. 390. The husband and wife in that case resided and were married in England, where they lived together for seventeen years. After their separation, the husband spent a few months in Scotland. His wife went to Scotland while he resided there, and obtained a divorce in Scotland for adultery committed there. She then married a Frenchman, and went to live with him in France. She had at one time made a will in England. She made a later one in France, valid according to the laws of that country, revoking all former wills. It was decided that the domicile of the husband continued in England, that the Scotch divorce was consequently a nullity; the second marriage illegal; and that her domicile continued to be in England and not in France. Probate was therefor decreed of the English will.

An English woman married a German and resided in Germany, where after the death of her husband she made her will

in the English form. She acquired by marriage the domicile of her husband, and became a German subject. Neither the fact of her origin, or the provisions of The Naturalization Act which enables a British subject to make a will abroad either in accordance with the law of the place where it is made, or of the law of the domicile, or of the law of the domicile of origin, made it valid. Probate was accordingly refused: *Von Buseck*, 6 P.D. 211. Affirmed *sub. nom. Bloxam v. Favre*, 8 P.D. 101.

The same principles have been affirmed in *Le Sueur v. Le Sueur*, 1 P.D. 139; *Firebrace v. Firebrace*, 4 P.D. 63; *Harvie v. Farnie*, 8 A.C. 43; *Green v. Green* (1893), P. 89; and inferentially recognized in *Le Mesurier v. Le Mesurier* (1895), A.C. 517.

An infant cannot by his own act change his domicile of origin, which is that of his father, if he is legitimate, otherwise that of his mother: *Somerville v. Somerville*, 5 Ves. 787. During infancy his domicile follows that of the father, and upon the decease of the father, that of the mother, in the absence of fraud: *Pottinger v. Wightman*, 3 Mer. 67.

The Court will apply to a French will the limited duration given by the law of that country to the word "executor," and will pass the executor over if his term has expired: *Laneuville v. Anderson*, 2 Sw. & Tr. 24.

If a will has been proved here on the strength of an exemplification from the Courts of the domicile, an application for probate of codicils subsequently discovered must be made first in the country of the domicile. The first probate of the codicils must be granted by the Court which granted probate of the will: *Miller*, 8 P.D. 167.

The laws of a foreign country may be shewn by the certificate of the ambassador of that country under seal of the legation: *Klingenman*, 3 Sw. & Tr. 19.

The more usual mode of proof is by the affidavit of an expert in the law of the foreign country. One whose knowledge of foreign law is based on study of that law in a university in some other country will not be accepted as an expert: *Bristow*

v. *Sequeville*, 5 Ex. 275. Nor will he be recognized as an expert, if he have studied the foreign law in this country: *Re Bonelli*, 1 P.D. 69.

A will made in France by a native Frenchman, who had become naturalized in England, and was, at the time of his death, though domiciled in France, a British subject, was made and executed in accordance with the formalities required by English law. The English Court required evidence that the will was validly executed according to the law of France, having regard to the French origin, British allegiance, and French domicile of the testator. This evidence was furnished by the affidavit of a French advocate, a second affidavit having been insisted upon because the first affidavit filed was not sufficient to fully satisfy the Court as to the law of France applicable to all the circumstances of the case: *Lacroix*, 2 P.D. 94.

Where an English will ratifies and confirms a foreign will, it is necessary to incorporate both in the probate. But if the testator makes two wills, one dealing with his property in the foreign domicile, and a second will which he distinctly wishes to take effect as a separate testamentary disposition in England, independent of his general will and disconnected from it, probate of the English will should be granted without the incorporation of the general will. An affidavit will be required to be filed verifying a copy of the foreign will, and a note appended to the probate that such an affidavit has been filed, so that the probate will be notice of the existence of the foreign will: *Astor*, 1 P.D. 150, followed in *Fraser*, 13 P.D. 285, and in *Calloway*, 15 P.D. 147. In *Seaman* (1891), P. 253, the testator left two wills, one referring to his property in Manitoba, the other to his property in England, where he was domiciled. A separate executor was named for each will. Probate of the Canadian will was granted by the Manitoba Court; probate of the English will only was granted in the form sanctioned by the last two cases, on an affidavit shewing that the moveables mentioned in the Canadian will were in Canada at the

time of the testator's death, and also that the moveables mentioned in the English will were in England.

Similarly in *De la Rue*, 15 P.D. 185, the testator had executed two wills, one according to the English form, appointing executors and disposing only of his property in England; the other according to the Swiss form, appointing no executors and disposing of property only in Switzerland and Italy. It purported to be entirely independent of the English will. On an affidavit being filed that, if the English executors intermeddled with the Swiss estate, they would come into conflict with the Swiss Court which, when no executors are appointed, administers the estate under the law of that country, and on a certified copy of the Swiss will being filed, probate was granted of the English will only.

In the *Goods of Dost Aly Khan*, 6 P.D. 6, letters of administration were granted in somewhat peculiar circumstances. Dost Aly Khan had died in Persia, where he was minister of finance. He had previously made his will, valid according to Persian law. The will and all the property in Persia were taken possession of by the Court in that country. The decrees of that Court are absolutely irrevocable. The Court had divided all the testator's property in the presence of his legatees and heirs, and, in conformity with Persian law, had given each one a document under the seal of the Court specifying what particular property of the deceased was apportioned to him. One of his sons was in this way given funds standing in the deceased's name in the Bank of England. By Persian law neither the will nor any copy of it is ever allowed out of the possession of the Court; and the contents are not disclosed, except to, and in the presence of, the legatees and heirs. There is nothing analogous to probate or administration in Persia, except the documents given to each legatee or heir, which is sufficient in Persia to enable the person named in it to obtain the property specified in it. The document in question was duly signed and sealed, and verified by the Persian Minister for Foreign Affairs and the British Minister at



the Court of Teheran. It was also accompanied by a duly authenticated translation. The Persian law was proved by two affidavits of experts skilled in the law of that country, which has no professional lawyers. The Court directed administration to be granted to the duly constituted attorney, for the purpose, of Dost Mahomed Khan, limited to the property mentioned in the authenticated translation of the document given by the Persian Court to him.

The law of a foreign country, in reference to testamentary dispositions and probate thereof, is sufficiently proved by the certificate of the ambassador of that country, and on the evidence of such certificate that no will of a deceased member of the Royal family of Russia could take effect as such, but that such property is distributed according to an *acte definitif* decreed by the other members of the family and confirmed by the Emperor, probate of the *acte definitif* was granted in England, notwithstanding the existence of a will: *Prince Oldenburg*, 9 P.D. 234.

In *Rule*, 7 P.D. 76, the deceased person was domiciled in Mexico, where he made his will in English. The Mexican Courts decreed probate of a Spanish translation of the English will. Upon an application for a grant of administration with the will annexed, the question was whether a duly authenticated copy of the English will, or a certified translation of the Spanish translation, should be recognized. Sir James Hannen, the President of the Court, in giving judgment said: "The certified translation of the original will is the proper document upon which I must act. The Courts of this country give credit to a foreign tribunal for having duly investigated the facts upon which it proceeded, and in this case I find that the foreign Court has recognized the existence of a will in a particular form as contained in a Spanish, or alleged Spanish, translation of the original will. That, therefore, is the only document on which I can proceed, and upon that document being translated into English I shall act upon it. I grant administration, with the will so translated annexed."



The will of a British subject, domiciled in Antwerp, had been proved in France, where he had property. A translation of his will was registered in the court there, and the original will, which was in English, was returned to the notary, who, under the law of France, was forbidden to let it out of his custody. The law of France was proved by the affidavit of a French advocate. Probate of the will was granted in England, not of the French translation, but of a copy of the original will, in English, verified as a true copy by affidavit, limited until the original will should be brought in. It may be observed that this case is distinguished from the last by the fact that the testator was not domiciled in France, and the will apparently had not been proved in the country of the domicile: *Lemnae* (1892), P. 89.

A translation of the foreign will, whether it be the original or a notarial copy, must be annexed to the foreign document. The translator, if he be not an English notary, or a person whose competency is vouched for by his official position, files an affidavit as to his qualifications, and verifies the translation. The executor is sworn to the foreign original or copy, but the translation alone is engrossed and registered. *Tr. & Co. Prob. Pr.* (13th ed.), p. 220.

A testator domiciled in British Guiana by his will appointed two executors, one resident in the colony, the other in England, with power of substitution in the event of either or both being unwilling to act. The executor in the colony administered the estate until his removal to England. Before such removal he, following the law of the colony, appointed the Administrator-General as substitute executor, who thereupon proceeded to administer in the colony. There being also property in England to be administered, a grant of administration with the will annexed was made to persons nominated as his attorneys by the Administrator-General, for his use and benefit, limited until the Administrator-General or the resident executor who had not renounced should apply: *Black*, 13 P.D. 5.

The deceased having made a will disposing of property in

Tasmania, and appointing executors residing there, subsequently executed another will disposing of his property in England and confirming his former will. In the last will he appointed three executors, distinct from those named in the Tasmanian will. Probate was granted in England of the later will. This probate, when submitted to the Tasmanian Courts, was rejected as a basis for probate there, on the ground that the document was only a part of the deceased's will. On the suggestion of the Tasmanian Court, an application was made to the Court in England to revoke its grant of probate, and to make a new grant including both wills. The application was granted: *Harris*, 2 P.D. 83.

In *Crawford*, 15 P.D. 212, an application for probate in England on the basis of an exemplification of the probate granted in New Zealand, where the testator was domiciled, was refused. The New Zealand probate only extended to the will, the application in England was for the will, and also for a testamentary appointment in pursuance of a power in a settlement. The testamentary appointment was mentioned in the will. The Court suggested an application to the New Zealand Court to have the appointment incorporated in the probate there, but declined probate until that was done.

It should be noted that though a will, in so far as it is an appointment under a power, is valid if made according to the law of the foreign domicile, it is also valid if made according to the law governing the execution of wills here. The leading case on that point is *In the Goods of Alexander*, 29 L. J. P. & M. 93.

Although the opinion has been expressed in later cases that the decision in *In the Goods of Alexander*, 20 L.J. P. & M. 93, is erroneous, in deciding that the rule of law which requires a will to be executed in accordance with the law of the domicile does not apply to a will which disposes of personal property in pursuance of a power of appointment, yet that case has been uniformly followed. It would seem from the decision in that case that the actual report made by the Judicial Committee in *Tatnall v. Hankey*, 2 Moo. P.C. 342, is explicitly to the same

effect. In *Huber* (1896), P. 209, the decision in *Alexander* was followed, it being thought that the rule had been too long established to be changed, and it was also followed in *T'refond* (1899), P. 247.

*D'Huart v. Harkness*, 34 Beav. 342, however, considers a number of these cases, and decides that "when a person simply directs a sum of money to be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the laws of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will, which, according to the law of this country, is valid, though it does not follow the forms of the statute. The case cited (*Re Alexander*) merely shews that an appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the domicile."

This case was considered in *Hummel v. Hummel* (1898), 1 Ch. 642, where it was distinguished from *In re Kerwin's Trusts*, 25 Ch. D. 373.

*D'Huart v. Harkness* was followed in *Re Price* (1900), 1 Ch. 442, and distinguished from the last two cases.

It would seem then that so far as an appointment by will is concerned, the will is effectual if made either according to The Will's Act, or according to the law of the testator's domicile, unless the will is valid only by reason of Lord Kingsdown's Act.

Section 1 of The Imperial Act, 24 & 25 Vict. ch. 114, known as Lord Kingsdown's Act, provides that every will and testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same, or at the time of his or her death, shall as regards personal estate, be held to be well executed for the purposes of probate in the United Kingdom, "if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or

by the laws then in force in that part of His Majesty's dominions where he had his domicile of origin."

Section 3 of the same Act provides that "no wills or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same."

A Scotchman made a will and also subsequently married while still living in Scotland. Under Scotch law marriage does not revoke a will. Later he acquired an English domicile. It was held that, as the will was valid so long as he remained in Scotland, it was entitled to probate in England. It is said in the judgment that there is not probably any doubt that, but for Lord Kingsdown's Act, the will would be invalid: *Reid*, 1 P.D. 74. But in *Groos* (1904), P. 269, doubt is expressed whether such a will, good when made, and valid so long as the person making it had not changed his domicile, would not, apart from that Act, be valid notwithstanding the change of domicile.

The Wills Act of 1902 (Ont.) enacts sections 1 and 3 of Lord Kingsdown's Act in Ontario, substituting "Ontario" for "United Kingdom," but it does not apply to wills of persons who died before the passing of the Act.

It has been decided that an instrument which, though it may be so executed as to comply with section 1 of Lord Kingsdown's Act, is not executed in accordance with The Wills Act, is not a good execution of a power of appointment. The Wills Act provides that no appointment by will, in exercise of a power, shall be valid unless made with the formalities prescribed by The Wills Act. In *Hummel v. Hummel* (1898), 1 Ch. 642, the testatrix, a British subject residing in France, left an unattested writing signed by herself, valid as a will, it was said, in France, by which she purported to exercise a power of appointment conferred upon her by her father's will. The absence of two witnesses was, under The Wills Act, a fatal objection. To the same effect is the decision in *Re Kerwin's Trusts*, 24 Ch. D. 373.

These decisions are reconciled with such cases as *D'Hurst v. Harkness*, 34 Beav. 342, and *Re Price* (1900), 1 Ch. 442, by limiting their application to wills which are valid only by virtue of 24 & 25 Vict. ch. 114, as was pointed out in *Re Price*.

That case also contains some observations regarding the law of construction applicable to a foreign will. It is pointed out that when upon the face of the will the testator designed it to be interpreted according to English law, it will be so construed, notwithstanding the foreign domicile.

Questions of status and of legitimacy, as affecting kinship and the right to inherit, are determined by the law of the domicile of origin of the persons claiming relationship, and not by the law of the jurisdiction in which the deceased person was domiciled: *Hunt v. Trust & Guarantee Co.*, 10 O.L.R. 147.



## CHAPTER VIII.

### HOW WILLS ARE NOW EXECUTED.

Wills made by persons domiciled abroad are governed by the law of the domicile. Wills made prior to The Wills Act, 1837, in England, or prior to the 1st of January, 1874, in Ontario, are subject to the laws then in force in relation to the mode of execution.

But the greater number of wills are subject to the requirements, as to execution, imposed in England from and after the first day of January, 1838, as amended by 15 Vict. ch. 24 in order to remove the somewhat restricted construction put upon the words "at the foot or end thereof," in the earlier Act; and the amendment was made retrospective. These provisions have been embodied in the statutes of all the English-speaking provinces.

Section 9 of The Wills Act, 1837, enacted that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

But what does signing "at the foot or end thereof" mean? Wills were sometimes signed in the body of the testimonium or attestation clause, sometimes below the latter clause, or a blank space was left between the end of the will and the signature. In *Smee v. Bryer*, 6 Moore P.C. 404, the Judicial Committee of the Privy Council, to whom appeals from the Prerogative Court of Canterbury were taken, held that the words "at the foot or end thereof" were to be construed strictly. Accordingly a holograph will which ended on the third page, leaving sufficient space on

that page for the signature of the testator and of the witnesses, if no formal attestation clause were added, but which was completed by an attestation clause and the signatures on the fourth page, the signature of the testator being near the middle of the page with nothing written above it on that page, was held not to be signed "by the testator at the foot or end thereof," and it was rejected. In consequence of this and similar decisions, the intention of many testators were frustrated, and, to remedy the evil, 15 Vict. ch. 24, was passed. After reciting the provision of The Wills Act that no will shall be valid unless signed at the foot or end thereof by the testator or some other person in his presence and by his direction, it proceeds:—

"Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance, that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on, or at the

bottom of the preceding side or page or other portion of the same paper on which the will is written, to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

The will must be in writing. The only exception is that contained in section 10 of the English Wills Act, 1837, section 14 of the Wills Act of Ontario, in favour of "a soldier being in actual military service or any mariner or seaman being at sea." These may dispose of personal estate as freely by a nuncupative will as they might have done before the Wills Act. This section has been enacted in all the English-speaking provinces of Canada. The writing need not be continuous. Blank spaces may be left: *Corneby v. Gibson*, 6 Notes of Cases 679.

The will may be written upon any substance, with any instrument or material, and in any language: *Hawkes v. Hawkes*, 1 Hagg 322; *Reynolds v. Kortright*, 18 Beav. 417; *Foubert v. Cresseron*, Shower P.C. 194. If a will chance to be in a foreign language, probate is granted of a translation of it: *Rule*, 4 P.D. 76.

The will must be signed by the testator, or by some other person in his presence and under his direction. The signature of the testator may be his ordinary signature or his full name. His initials are sufficient: *Blewett*, 5 P.D. 116; *Emerson*, 9 L.R. Ir. 443. The testator, though able to write, may make his mark, without more, even though his name nowhere appears, and the mark is a sufficient signature: *Bryce*, 2 Curt. 325; *Baker v. Denning*, 8 A. & E. 94; *Wilson v. Beddard*, 12 Sim. 28.

So a testator whose Christian name was Thomas, having affixed his mark to a will in which he was called John, the Court, on being satisfied by affidavit that Thomas duly executed the

paper, granted probate of it: *Thomas Dance*, 2 Sw. & Tr. 593; *Addy v. Grix*, 8 Ves. 504; *Harrison v. Harrison*, 8 Ves. 185. A will of a woman who had been married, was executed by the testatrix making her mark opposite to where her maiden name had been written. As there was no doubt of the identity of the testatrix, the will was, notwithstanding the error in name, admitted to probate: *Clarke*, 1 Sw. & Tr. 22.

Probate would, however, be refused if the testator inadvertently executed the will of some other person by mistake for her own, though the provisions of the two wills were almost identical: *Hunt*, 3 P. D. 250.

The testator may validly sign his will by affixing a seal which he has stamped with his initials, and has duly acknowledged as his hand and seal: *Jenkins v. Gaisford*, 3 Sw. & Tr. 93. An assumed name has been held to satisfy the statute: *Glover*, 5 Notes of Cases 553; *Redding*, 2 Robert. 339.

But the mere putting on of a seal by the testator is not a sufficient signature: *Wright v. Wakeford*, 17 Ves. 459; *Ellis v. Smith*, 1 Ves. Jr. 11.

The signature must be made by the testator or by some person in his presence and by his request. "In his presence" means in his actual, visual presence. He must know what is being done. If he does not know, or have the opportunity of knowing, what the person signing is engaged in, the will is not signed in the presence of the testator: *Brown v. Skirrow* (1902), P. 3. But a proper acknowledgment of the signature subsequently, in the presence of two or more witnesses is sufficient, without evidence that the signature was made by the testator, or by some other person in his presence and at his request: *Gaze v. Gaze*, 3 Curt. 456. One of the attesting witnesses may sign for the testator in his presence and at his request: *Bailey*, 1 Curt. 914. It is not essential that the testator actually saw the signature written. It is sufficient if he could have seen it made, if he had looked.

Thus a testatrix executed her will in her carriage, and the witnesses subscribed in the solicitor's office, in such a situation that



she might have seen them through the window from the carriage, if she had looked, and the execution was held to satisfy the statute: *Casson v. Dade*, 1 Bro. C.C. 99. But where the testatrix lay in bed with the curtains closed, and her back towards the witnesses when they attested the will, so that it was impossible for her to see them do so, as she was too weak to turn herself in bed, the statute was not complied with: *Tribe v. Tribe*, 7 Notes of Cases 132.

The request may be express or implied. The request of a third person in his presence and hearing is sufficient: *Inglesant v. Inglesant*, 3 P. & D. 172.

The signature must be made or acknowledged in the presence of two or more witnesses present at the same time. "Presence" means the actual, visual presence. At the end of the transaction the witness should be able to say with truth, "I know that this testator or testatrix has signed this document." Mere presence in the room without knowledge of what is being done, is not sufficient. Accordingly when a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness was on the other side of the shop, and did not know nor have the opportunity of knowing, what was being done, until after the other two had signed, the will was not properly executed, though the testatrix acknowledged the signature in the presence of the two witnesses, just before the second witness signed. Such acknowledgment was not sufficient, because the first witness had attested the will before the signature was acknowledged in the presence of the second witness: *Brown v. Skirrow*, [1902] P. 2.

The attestation by both witnesses must be after the signing or acknowledgment. *Ib.*, p. 7. In *Wyatt v. Berry*, [1893] P. 5, the testator produced his will to one witness, the signature being already on it, and told him that it was his will. The witness then signed it. The second witness, who was on another floor of the building, was then sent for, and was asked by the testator to wit-



ness the paper, saying, "It is a bit of ordering of my affairs, I have signed it, and your father [the first witness] has signed it." The second witness then signed the will, all three being present. The will was not, however, duly executed in accordance with the Act. The acknowledgment was made in presence of the second witness after the first witness had signed.

"The Act is not complied with unless both witnesses shall attest and subscribe after the testator's signature shall have been made or acknowledged to them where both are actually present at the same time. If one witness has previously subscribed the paper, and merely points out her signature when the testator acknowledges his signature in her presence and that of the other witness, which latter witness alone then subscribes, that I hold not sufficient." *Hindmarsh v. Charlton*, 8 H.L.C. 160.

The correction of an error in the previous writing of his name by a witness, or his acknowledgment of it, or the adding of a date to it, when the testator acknowledges his signature in the presence of the second witness, who was not present when the testator and first witness signed, is not sufficient. *Ib.*

Acknowledgment by a witness of his signature previously made, is useless. The testator may acknowledge a signature previously made, but a witness to a will cannot. He must *subscribe* in the presence of the testator, after the testator has subscribed or acknowledged his signature in the presence of both witnesses: *White v. The British Museum*, 6 Bing. 310. "To make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name was not written nor do I think there was anything written which was meant to represent the name. The horizontal stroke made by the witness was merely meant to perfect the letter "F" in the same manner as if he had perfected the letter "i" by putting a dot over it, which he had not dotted in the morning. Now can that be considered as amounting to a new subscription? It was an acknowledgment

by him of his former subscription written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient. When I was at the Bar there was a question whether the acknowledgment of the signature, by a witness putting a dry pen over it would be sufficient, but since that time it has been decided that it would not be sufficient": *Hindmarsh v. Charlton*, 8 H.L.C., at p. 167-8.

Re-tracing the name with a dry pen by the witness is invalid: *Maddock*, 3 P.D. 169.

Instead of signing in the presence of the witnesses, the testator may acknowledge his signature in the presence of two witnesses, both present together, before either of the witnesses has signed.

"There is no sufficient acknowledgment unless the witnesses either saw, or might have seen, the signature, not even though the testator should expressly declare that the paper to be attested by them in his will": *Blake v. Blake*, 7 P.D. 102. The acknowledgment in that case was rendered invalid by the testatrix keeping her signature covered by a piece of blotting paper. The same rule is approved in *Daintree v. Butcher*, 13 P.D. 102.

"When the witnesses either saw, or might have seen, the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will, or a direction to them to put their names under his, or even a request by the testator or by some person in his presence, to sign the paper is sufficient": Jarman on Wills; *Daintree v. Butcher*, 13 P.D. 102.

When the testator produces the document to the witnesses, his signature being then upon it, so that they can see it, if they look, and they are requested to subscribe to it by the testator, or by some one in his presence, that is sufficient acknowledgment to satisfy the statutes: *Ilott v. Genge*, 3 Curt. 172.

The acknowledgment may be made by gestures: *Davis*, 2 Roberts. 337.

The request to sign may be made by some other person in the presence of the testator: *Inglesant v. Inglesant*, 3 P. & D. 172.

In that case the testatrix signed in the presence of one witness, the second witness then came in, and without anything being said or done by the testatrix, his signature being openly visible upon the document, another person in the hearing of the testatrix and the witnesses, asked the witnesses to sign their names, she pointing out the place for their signatures, just beneath the signature of the testatrix, and they thereupon signed. One of the witnesses did not know that the document was a will. It was, however, decided that the request of the third person was, in effect, the request of the testatrix, and that such a request made by the testatrix was a sufficient acknowledgment of her signature.

As an example of an insufficient acknowledgment of the testatrix's signature, *McNeil v. Cullen*, 35 S.C.R. 510, may be referred to. The will was to be proved in solemn form. The solicitor who drew it testified that it was signed by the testatrix before the arrival of the witnesses, and that on their arrival he asked her if the signature to it was hers, and if she wished the two witnesses to sign it as such, to which she answered in the affirmative; each of the two witnesses admitted his signature, but denied that such question had been asked and answered. The Judge of Probate held that the will was not properly executed, and his decision was affirmed by the Supreme Court of Nova Scotia: 36 N.S.R. 482. The Supreme Court of Canada, while apparently of opinion that if the Courts below had held the will valid, the decision might have been upheld, thought that the finding of two Courts on a matter of fact should not be disturbed.

It must appear that the signature of the testatrix was affixed to the will when it was produced to the witnesses, or the acknowledgment is insufficient: *Ilott v. Genge*, 3 Curt. 160; 4 Moo. P.C. 265. The mere production of a paper with the request that the witnesses will sign it, in the absence of a formal attestation clause from which it could be inferred that the tes-

tatrix knew the necessary formalities, and had therefore observed them, is not sufficient, in the absence of express proof, to justify the Court in drawing the inference that it was already signed by the testatrix: *Fischer v. Popham*, 3 P. & D. 246. But if there is a proper attestation clause the inference is that the signature of the testator, if the will is in his handwriting, was on the will when signed by the witnesses, even though the witnesses have forgotten all about the occurrence, but recognize their own signatures: *Woodhouse v. Balfour*, 13 P.D. 2; *Wright v. Sanderson*, 9 P.D. 149.

If a will, with a proper attestation clause, appears upon the face of it to have been regularly executed, the presumption of law is that the testator duly acknowledged his signature. So strong is this presumption that the evidence of the sole surviving witness to the execution, which was to the effect that at the time of execution the only writing on the paper was the signature of the testator and of the witnesses, has been discredited as given under mistake or from failing memory: *Lloyd v. Roberts*, 12 Moo. P.C. 158.

If the will is that of a marksman, more formal acknowledgment of the signature by the testator seems to be necessary, and it must be shewn that he knew the contents of the document: *Morritt v. Douglas*, 3 P.D. 1.

It is not essential that the signatures of the witnesses be at the end of the will under the attestation clause. It is sufficient if they sign with the intention of attesting the execution of the will, wherever their signatures may be placed. Thus *In the Goods of Streatley* (1891), P. 172, the witnesses had signed their names opposite alterations on the first and second pages of a will consisting of two sheets, but they did not sign elsewhere. The testator had signed at the end of the will. Evidence being given to shew that the intention of the witnesses in signing was to attest the will, it was held to be validly executed, following *Roberts v. Phillips*, 4 E. & B. 450, in which it was held that



“subscribed” in the Act meant not “written underneath,” but “written upon the will.”

Both witnesses must be present when the signature of the testator is made upon the will, either by the testator or by some person, one of the witnesses, for instance, in his presence and by his request, or when the testator acknowledges his signature if the signature has been previously made. Each witness must also attest and subscribe in the presence of the testator. It is not required by the Act that they shall subscribe in the presence of each other: *Brown v. Skirrow* (1902), P. 5.

We have seen that the narrow construction put upon the words “at the foot or end thereof,” in the Wills Act, was abrogated by legislation. A brief notice of some of the decisions rendered since will illustrate the generality of the curative enactment.

A signature written across the second page of a paper on the first and third pages of which the will was written, is sufficient: *Powell*, 4 Sw. & Tr. 34.

When the testator’s signature just touched the last line of the will and extended across the line above it, it was held to be signed at the foot or end thereof: *Woodley*, 3 Sw. & Tr. 429.

A will made in France was sufficiently executed by signing beneath the notarial number written upon the same sheet: *Page v. Donovan*, Dea. & Sw. 278.

But a signature at the end of several sheets, except the last, is not a signature at the end, and the will was rejected: *Sweetland v. Sweetland*, 4 Sw. & Tr. 6.

A will ended on the middle of the second page of a folded sheet, the lower part of the page being blank. The testimonium clause, the testator’s signature, the attestation clause and the signatures of the witnesses followed in that order on the third page, the signatures being all near the right hand side of the page, the attestation clause extending from the left about half way across the sheet. The signature of the testator on the third page was opposite the words “I do hereby nominate and appoint,” which



began the paragraph appointing executors, that paragraph being the concluding sentence of the will. The signatures of the witnesses were opposite to, and a little lower than, the last words of the will. It was decided that, as the testator's signature was opposite to the concluding sentence of the will, the execution was within the Act, and the will good. The signature was "so placed beside, or opposite to, the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such, his signature to the writing signed as his will: *Williams*, 1 P.D. 4.

In *Cocmbs*, 1 P.D. 302, the will was written on the first and third pages of a sheet of foolscap, there being no room at the end of the third page for the signature. The testimonium clause, the signatures of the testator and of the witnesses were written on the second page, there was no attestation clause. Probate was decreed.

In *Ainsworth*, 2 P.D. 151, the last bequest on the will was written on four lines, one line extending across the page above the testator's signature and three short lines extending half way across the page, the upper one of the three being opposite the testator's name. The two witnesses signed beneath the testator's signature, and to the right of the two short lines. On proof that these lines were written before the execution of the will it was admitted to probate. The signature was beside or opposite to the end of the will.

In *Horsford*, 3 P.D. 211. The signatures of the deceased and of the witnesses were on a piece of paper which was attached by a string to the paper on which the codicil was written, just opposite to the end of the writing. On this piece of paper so attached, above the signatures, was written, "To which codicil I hereunto annex my seal and signature," and the date. The will to which that was a codicil was written on five pages of foolscap. The attestation clause, with the signature written beneath it was on the fifth page. At the top of the sixth page was written, "To which will and testament I here-

unto annex my seal and signature," and the date. Just beneath this writing was the signature of the testator. The Court, not being satisfied on the affidavit as to the due execution or plight of the codicil, directed the attendance of the witnesses in court, and thereafter granted probate of both will and codicil. See also *Gausden*, 2 Sw. & Tr. 362; *Cook v. Lambert*, 3 Sw. & Tr. 46.

In *Fuller* (1892), P. 377, the whole of the disposing part of the will was written on the first page of a sheet of foolscap; the second and third pages were blank; the attestation clause and the signatures of the testator and the witnesses were all on the fourth page of the sheet. The argument addressed to the Court was that the sheet was not opened, and that, when the will was written, the sheet was turned over, with the second and third pages closed, and the signatures written on the fourth page, at the end of the will. The will was held entitled to probate.

In *Dilkes*, 3 P.D. 164, the form on which the will was filled in contained attestation clauses at the end of the first and second pages. The will was written on both pages. The testatrix made her mark on both pages, the witnesses signed the attestation clause on the first page *before* the testatrix made her mark on the second page, but did not sign the second page. The mark at the end of the will was not attested, and the application for probate was rejected.

In *Margary v. Robinson*, 12 P.D. 8, the testator, who was paralyzed and dying, gave directions which were written down on a card. He made his mark in the middle of the writing. The two witnesses wrote their initials on the reverse side of the card. The card was held to be duly witnessed, but the position of the testator's mark, not being at the end, invalidated it.

In *Hughes*, 12 P.D. 107, a codicil was written on the third page of a sheet of foolscap, on the first page of which the will had been executed. The codicil began with the words, "The following alterations having first been made," and ended with, "Signed by the testator on the margin of the

afore-written will, in the presence of us, etc." The mark of the testator and the signature of the witnesses were placed in the margin of the first page, under the mistaken impression that as the codicil was to make alterations in the will, it should be executed in the same way as an alteration. The codicil, not being signed at the foot or end thereof, was invalid.

In *Phipps v. Hale*, 3 P.D. 166, the will was written on ten sheets of paper. The testator in the presence of the witnesses signed the tenth sheet, and put his initials on the other nine. One witness signed the attestation clause on the tenth sheet, and signed the other nine opposite the initials of the testator. The other two witnesses wrote their names opposite the initials on the nine sheets, but did not write anything on the tenth sheet. There was nothing from which it could be inferred that the signatures of the witnesses were intended to do more than attest the initials on the earlier sheets, and the execution was defective.

In *Royle v. Harris* (1895), P. 163, the testamentary document was complete, as to form, on the first page. It had an attestation clause on that page, and was duly signed and witnessed. It contained a bequest to "my sisters and friends," without further particulars of the bequests, and appointed executors. On the second and third pages was contained a list of legacies to various sisters and friends. The grant was limited to the first page. There was nothing on the first page to incorporate the second and third pages by reference. Nor could it be said that the signature was opposite to them. The Court distinguished the case from *Wottan*, 3 P.D. 159, in which the attestation clause and signatures were on the first page of a sheet of paper, on three pages of which the will was written. In that case, however, the formal commencement of the will was on the second page of the paper, it was continued on the third page, and ended on the first page.

The signature of the testator when written in the blank space left in the attestation clause of a lithographed form of will beginning "Signed and declared by — the testator, as and

for, etc., has been held to be a good signature by him, if it appears that in so signing he intended thereby to execute his will: *Walker*, 2 Sw. & Tr. 354. And that, too, though the testator signed his name again beneath the signatures of the witnesses after they signed; but the second signature was omitted from the probate: *Casmore*, 1 P.D. 650.

In *Huchvale*, 1 P.D. 375, the only signature was that in the attestation clause, which had apparently been inserted some time subsequent to the writing of the attestation clause. Neither of the attesting witnesses could say whether it was there when they signed or not, but they deposed that nothing was written by the testatrix at the time they signed. The Court, independently of any positive evidence, formed its own conclusion, from circumstances and the appearance of the document, that the name was there at the time of the attestation, and granted probate.

The circumstances in *Pearn*, 1 P.D. 70, were similar, and similar inferences in favour of the validity of the will were drawn.

In *Puddephatt*, 2 P.D. 97, there was an imperfect attestation clause, and the signature of the testator appeared beneath the signatures of the witnesses. When the will was propounded for probate, both of the witnesses were dead, and no one else could be found who was present at the execution of the will. The only evidence, not derived from the document, regarding the execution, was the proof of the handwriting of the testator and the witnesses. It was argued that the Court could properly assume from the wording of the attestation clause that the will was duly executed; and probate was decreed.

When the will was in the handwriting of the testator, and his name was the concluding word of the last clause, the Court, being satisfied that the name was *intended* for a signature, admitted it to probate: *Trott v. Skidmore*, 2 Sw. & Tr. 12.

In *Archer*, 2 P.D. 252, the will was written by the testator, in the presence of the witnesses, across the second and



third sides of a sheet of note paper, the lower part of these pages being left blank. The attestation clause and the signatures were written across the top of the first and fourth pages of the sheet. The execution followed immediately after the testator had drawn the will. The case was distinguished from *Hammond*, 3 Sw. & Tr. 90, in which probate was refused because there was no evidence that there was any writing on the document before the signatures were put there; and the will having been on the second and third pages when the signatures were affixed, the execution was good.

When the will occupied the whole of the half sheet of note paper on which it was written, the names of the attesting witnesses being signed at the bottom, and the signature was along the edge of the paper at the lower part, it was good: *Jones*, 4 Sw. & Tr. 1.

A will filled two sheets of note paper, leaving no room at the foot of the second page for the signatures, which were written along the sides of the paper on the third page. It was upheld: *Wright*, 4 Sw. & Tr. 35.

There being no room at the foot of the single page on which a will was written, the testator executed it by writing his name transversely along the left hand margin at the top of the will, and extending down to the second line of the will. The names of the witnesses were written opposite that of the testator, at the top of the will. Held good: *Collins*, 3 L.R. Ir. 4.

Where from the obvious sequence and sense of the context, the signature really follows the dispositive part of a testament, though it may occupy a place literally above it, it will be admitted to probate: *Kimpton*, 3 Sw. & Tr. 427.

In *Mann*, 28 L.J.P. 19, the testimonium clause was, "In witness whereof, I, Martin Hall Mann, have hereunto set my hand," and was in the testator's handwriting, the name being written as it was usually signed by him, but there was no other signature. This was held to be a valid signature amongst the words of the testimonium clause.



A disposition or direction written underneath the signature, or which follows it, or which is inserted after the execution unless properly authenticated, will be rejected as forming no part of the will.

In *Dallow*, 1 P.D. 189, there was a reference in the will to executors "hereinafter named," but it did not name them. Immediately underneath the testator's signature and opposite the names of the attesting witnesses, was a clause giving the names of the executors. This clause was written before execution. It was admitted that the position of the clause appointing executors excluded it from the will, unless it was incorporated by reference. But the will did not refer to it, so as to shew by the reference that it was in existence when the will was executed, and, therefore, it could not be incorporated.

In *Beit*, 2 P.D. 214, the testator left a sentence incomplete. After the sentence was an \*, and, also, the words, "see over." On the other side of the sheet, in the indented margin of a devise of lands, was another \* followed by the words, "see over." The writing on the second page completed the incomplete sentence on the first page, and it was there before the execution of the will. The words on the second page were treated by the Court as an interlineation made before execution, and were included in the probate.

The signatures of the witnesses must actually be made in the presence of the testator. There cannot in the case of a witness be a valid acknowledgment of his signature as with a testator: *Moore v. King*, 31 Curt. 353. He must actually sign. But he may sign by his mark, even though he can write: *Hindmarsh v. Charlton*, 8 H.L.C. 160. "To make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name."

"The subscription must mean such a signature as is descriptive of the witness whether by a mark or by initials, or by writing the name in full": *Ib.*

The initials of the witnesses may constitute a sufficient signature by them, if put there for that purpose: *Christian*, 2 Robert. 110.

The initials of the testator and of the witnesses in the margin are also a sufficient signing to attest alterations made after execution: *Blewitt*, 5 P.D. 116.

But initials merely placed to attest an alteration will not attest the will itself: *Martin*, 1 Rob. 712.

The attesting witness need not necessarily use his own name provided that the name written is intended to designate him: *Sperling*, 3 Sw. & Tr. 272.

His hand may be guided by another person while the name of the witness is written: *Harrison v. Elvin*, 5 Q.B. 117.

But a signature which a witness begins to write, and fails through weakness to complete, after writing his Christian name, is not sufficient, as it is not the intention of the witness that what he wrote should be his signature: *Maddock*, 3 P.D. 169.

In *Garner*, 1 L.R. Ir. 307, the testator signed, and the witness attested and subscribed with two crosses, as their marks. One of them who was literate, but temporarily unable to write, was able to identify the document and prove the circumstances. The will was validly executed.

At common law, he only was a credible witness who was not incapacitated by crime, interest or lack of mental capacity.

The spouses of interested parties were also incompetent as witnesses.

The disability from interest has, long since, been abolished by statute.

Under the Statute of Frauds devises of lands and chattels real had to be attested by three or more credible witnesses. To be credible, a witness must have no interest in the dispositions of the will, otherwise the will was invalidated by reason of his incompetency as a witness.

To obviate such enforced intestacy, 21 Geo. II. ch. 6 was passed. That statute voided the benefit of the witness under the

will, and declared the will itself good. It did not, however, extend to gifts to the spouse of the witness; nor did it apply to pure personality, but that was of minor consequence, as no particular number of witnesses was necessary in the proof of such wills.

The Wills Act, 1837, when it required all wills, of personality as well as of realty, to be in writing and attested by two witnesses with the formalities we have been considering, also provided that any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than for the payment of debts, should be void, and the witness competent to prove the execution of the will. The devise to the spouse of the witness, or to the witness, is not, however, stricken out of the will. It is utterly null and void, so far as the beneficiary is concerned. The will must first be construed as if the clause were in, and then section 15 (17 in Ont.) must be applied: *Aplin v. Stone* (1904), 1 Ch. 543. See also *Jull v. Jacobs*, 3 Ch. D. 703; *Re Townsend's Estate*, 34 Ch. D. 357; *In re Clark*, 31 Ch. D. 73.

A devise or bequest to one, as trustee only, does not lapse, as he has no beneficial interest: *Creswell v. Creswell*, 6 Eq. 69.

A creditor, or an executor, who witnesses a will, does not thereby forfeit his debt, or his executorship; both of these, though interested, are protected by the statute.

An executor who receives a legacy in that character, if a witness to the execution of the will, is a competent witness, if he had released his legacy: *Munday v. Slaughter*, 2 Curt. 72.

A solicitor who is also an executor and is empowered by the will to make professional charges against the estate for services as solicitor, is not in the position of a creditor, and if he is a witness to the will, his right to make such professional charges against the estate becomes null and void: *In re Barber*, 31 Ch. D. 665.

If the gift is made by will, and the beneficiary under the will attests the codicil, that does not void the bequest in the will,

even though the codicil indirectly enlarges his interest under the will: *Gurney v. Gurney*, 3 Drew. 208; *Re Marcus*, 57 L.T. 399.

So, too, if the gift by the will were made null by reason of his being a witness, and there is a codicil confirming the will, attested by other witnesses, the will and the gift in it to the witness are both established, and this gift will not be lost by reason of the legatee having attested a second codicil: *In re Trotter*, [1899] 1 Ch. 764.

Though there are three attesting witnesses, and two are sufficient, a gift to one of the three is null and void: *Wigan v. Rowland*, 11 Hare 157.

But if his name, though signed, was not intended as that of a witness, it may be omitted from the probate, and he may then take the gift: *Sharman*, 1 P.D. 661; *E. J. Smith*, 15 P.D. 2.

Section 14 of The Wills Act provides, "That if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."

It is at least doubtful whether, if one of the witnesses to a will was, at the time of its execution, obviously insane, so that while bodily present he was unable to comprehend or understand the act witnessed, the will would be valid, notwithstanding that section. It is probable that the disability sought to be removed by the section is legal disability or incompetency, not actual incompetency from mental disease, extreme youth, extreme drunkenness, or other like cause.

A nuncupative will is where the testator, without any writing, doth declare his will before a sufficient number of witnesses. Before the Statute of Frauds, 29 Car. II. ch. 3, a nuncupative will was of as great force and effect as a written will. And even after the Statute of Frauds, before The Wills Act, 1837, which was brought into force in substance in Ontario on the first day of January, 1874, it was not necessary that a will, codicil or testamentary paper should be signed by



the testator or attested by witnesses, to constitute it a valid disposition of the testator's personal property. It had, however, to be in writing, or be reduced into writing within six days after the making of the same, and clear proof was required that he intended it to operate as a testamentary disposition. That requirement was the motive underlying a number of the rules made in regard to the proof of such wills.

The will made by "any soldier being in actual military service, or any mariner or seaman being at sea" was excepted from the operation of the Statute of Frauds. Such wills might still be made without any of the restrictions which that Act imposed on bequests of personalty.

The same exception has been made in The Wills Act, 1837, sec. 11, and the Wills Act of Ontario, sec. 14.

Sometimes a distinction has been made between nuncupative wills, and military wills, the latter term being applied to the unwritten wills of soldiers, and the former to other oral testaments. The privilege of making wills without the observance of the ordinary formalities, was conferred by law upon Roman soldiers.

No formalities are required for making a will so privileged. A simple declaration, in writing or orally, of the disposition the testator desires to make of his personal estate after his death, is sufficient.

If the declaration is oral, the Court must have before it sufficient evidence to satisfy it of the contents of the declaration, and of the testamentary intention.

The following observations from Swinburne are relevant:—

"As for any precise form of words none is required, neither is it material whether the testator do speak properly or improperly so that his meaning do appear."

"And although in written testaments it is also required that the words and sentences be such as thereby the testator's meaning may appear; yet more specially is it required in a nuncupative testament, for more supply may be made in written testa-



ments than can be made in nuncupative testaments, concerning the testator's meaning."

If a military will, made by the testator while in active military service, contains alterations in his own handwriting, and there is no information obtainable as to when they were made, the presumption, in the absence of evidence to the contrary, is that they were made during the continuance of the active military service, and will be included in the probate: *Tweedale*, 3 P. & D. 204.

"Being in actual military service" is the condition on which a soldier can make a will without the statutory formalities. The term does not apply to a soldier while quartered in barracks either in England or in the colonies: *Drummond v. Parish*, 3 Curt. 522; *White v. Replan*, 3 Curt. 818; *Hill*, 1 Robert. 276.

In *Drummond v. Parish*, 3 Curt. 522, Sir Herbert Jenner Fust, in the course of his elaborate judgment, commenting on the admitted fact that the principle of the section was borrowed from the civil law, states his conclusion thus: "Being of opinion from the result of the investigation of the authorities, that the principle of the exemption contained in the 11th section of the Act was adopted from the Roman law; I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words *actual military service*, the privilege, as respects the British soldier, is confined to those who are *on an expedition*."

In *the Goods of Hiscock* (1901), P. 78, the test was held to be whether, before the will was made, some step under orders had been taken by the soldier, in view of and preparatory to joining the forces in the field. A private in a volunteer battalion who sent in his name for active service, passed the medical inspection, and, pursuant to an order, went into barracks to await the final order for embarkation, was in actual military service when he made his will in barracks. The will, though made by a person under twenty-one years of age, was upheld.

In *Gattward v. Knee* (1902), P. 99, it was decided that mobilization may be fairly taken as a commencement of what, in Roman law, was understood by the words *in expeditione*. "These words mean something more than the English words 'on an expedition,' because it is quite clear that, when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione*. It is a fair test to ask whether or not the person whose testamentary dispositions are in question, has done anything; but I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as to put him practically *in expeditione*. Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service." The will in this case consisted of a letter sent by the soldier to his friend giving directions as to the disposal to be made of his effects if he died. Administration with the will annexed was granted in the ordinary course, after the will was established in the action. This case was followed in *May v. May*, [1902] P. 103(n).

An oral declaration, made by a soldier in active service in South Africa, in response to inquiries by the military authorities, was reduced into writing by the squadron sergeant-major, and the circumstances attendant upon the making of the oral statement and its authenticity were proved by his affidavit and by the affidavit of the squadron quartermaster sergeant. Upon motion for a grant of administration to the personal estate and effects of the deceased with the contents of a nuncupative will of the 12th day of May, 1901, annexed, such contents being contained in a testamentary document written on the 12th day of May, 1901, the application was opposed. The affidavits were taken as proof of the making of the declaration of the deceased while on active service, and the document embodying the declaration was held to be testamentary. Some doubt arose whether in

military language the word "effects" includes all the property of the deceased, and whether the phrase "I desire all my effects to be credited" would pass all his property. But apparently on the well-settled principle that the construction of wills belonged to the Court of Chancery and not to the tribunals entrusted with the grant or refusal of probate or administration, the Judge of the Probate Division granted letters of administration with the will annexed, leaving the question of construction to be disposed of by the Chancery Division: *Scott* (1903), P. 243.

A soldier on his way from one regiment to another, both of them being in actual military service, is within the exception, so that his will is privileged: *Herbert v. Herbert*, Dea. & Sw. 10; *Thorne*, 4 Sw. & Tr. 36. In the last case the will, which was upheld as within the exception, was made by an officer ordered with a detachment of his regiment to Africa to join a military expedition into the interior. The will was made in contemplation of the intended march, but before the expedition had actually set out.

Persons in the military service of the East India Company were "soldiers" within the meaning of the statute: *Donaldson*, 2 Curt. 386.

In *Euston v. Seymour*, 2 Curt. 339, the commander-in-chief of the naval forces at Jamaica, who lived in the official residence there with his family, was held not to be "at sea" and so not within the section. But the unattested will of a seaman, on board a ship then lying in harbour in South America, who had obtained leave to go on shore, where he met with an accident in consequence of which he died in a few days, was held valid though made on shore after his injury. He was a seaman "at sea" within the meaning of the Act, though not actually on board ship at the time the will was made. In the former case, which was distinguished, Lord Seymour lived on shore, only occasionally going on board his ship: *Lay*, 2 Curt. 375.

A seaman in a river on a naval expedition was held to be within the spirit of the Act: *Hayes*, 2 Curt. 338; *Austen*, 2 Roberts. 611.

A surgeon in the navy, invalided at a foreign station, and on his way home by sea, is a "mariner or seaman at sea." The term mariner or seaman is taken to include the whole naval profession. Though when he made his will on the return voyage he was not actually on duty as a naval surgeon, yet as he was returning home invalided from such service when the will was made he was at sea within the meaning of the statute.

A will made by a mate on board a gunnery ship permanently stationed in Portsmouth harbour, was held to be within the statute. The cases go the length of saying that when a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception, though made on shore. He is subject to the restraints of the service, and might have no opportunity of making a will with the usual formalities, if he was taken ill on board: *McMurdo*, 1 P. & D. 540.

It applies also to merchant seamen: *Morrell v. Morrell*, 1 Hogg. 51; *Parker*, 2 Sw. & Tr. 375.

The Court distinguished this case from *Corby*, 1 Ecc. & Adm. 292, 1 A. & E. 392, in which probate of an informal will comprised in a letter, was refused. In the latter case it did not appear whether the letter was written before or after the testator went on board, and the expression he used in it might have meant nothing more than that he had signed the ship's articles, and bound himself to join the vessel on a certain date. It did not appear that he had commenced his maritime service.

In *Shearman v. Pyke* (1724), 2 Notes of Cases 334, the testator died in a hospital while abroad on a naval expedition. He was asked, while ill in the hospital, to make his will, and replied: "I give all I have to my master, and I will give nothing from him, and I'll make no other will; he may dispose of it as he pleases." The witnesses made an affidavit setting out the con-



tents of the will, but one of them died on the voyage home. After a contest the will was sustained, and administration with the will annexed, granted.

Previous to the Statute of Frauds, when a will of personal property could be made without writing, and, whether written or oral, could be revoked by an oral declaration, the only requirement concerning age was that the testator must be above the age of fourteen years if a male, or twelve if a female. See *Drummond v. Parish*, 3 Curt. 522.

Since the Wills Act, 1837, sec. 7, R.S.O. 1897, ch. 128, sec. 11, no will made by any person under the age of twenty-one years is valid. But the wills of soldiers being in actual service and of sailors being at sea are not within that, by reason of section 11 of the English Act (sec. 74, Ont.), which enables them to dispose of their personal property as if the Act had not been passed. Consequently a will made by an infant soldier in actual military service is good notwithstanding his infancy: *Farquhar*, 4 Notes of Cases 652; *Hiscock*, [1901] P. 78. In the latter case, the objection to the will on the score of infancy does not seem to have been seriously urged.

In *McMurdo*, 1 P. & D. 540, the testator was under twenty-one years of age when his will was made, but being a mariner at sea, the will was upheld.

No particular form of words is necessary in a nuncupative will; no particular number of witnesses is required; in many instances the only evidence in regard to its execution is the proof of the testator's handwriting, and of the receipt of the letter or other document by mail or otherwise by the person who propounds it; sometimes it is oral; and reduced to writing by the witnesses; in some instances the will was not reduced to writing until it was set out in the application for administration. For example, in an American case, *Hubbard v. Hubbard*, 4 Selden, N.Y., 196, the directions were given in response to questions. Questions and answers were deposed to by four witnesses. The will, and the appointment of the executor by the oral statement of the



testator, were upheld. Such a will may be established by the testimony of one witness: *Ex parte Thompson*, 4 Bradford N.Y. 160.

But the Courts have uniformly insisted on having clear evidence before them, sufficient to satisfy them of the facts which gave rise to the privilege, of the substance of the declaration, and of the testamentary intention in making it. In discussing the foregoing cases, we have incidentally noted the evidence acted on in each, when it was given in the report.

When the will is in writing and not attested, proof of the handwriting of the testator by the affidavits of two disinterested persons, stating explicitly that the signature is in his handwriting, in the form provided by the rules, was insisted on: *Neville*, 4 Sw. & Tr. 218.

If the will is signed by the mark of the soldier, it must be shewn by affidavit that at the time of its execution the testator knew and approved of its contents: *Hackett*, 4 Sw. & Tr. 220.

Averments in the affidavits in general terms that the testator was in the army in a specified capacity in actual military service at the time the writing was executed, is not sufficient. The facts must be set out, circumstantially and in detail, fully enough to enable the Court to judge whether the case falls within the privilege or not: *Thorne*, 4 Sw. & Tr. 36.

The master of a merchant vessel who was also part owner, in the course of his voyage, wrote and forwarded a letter from Adelaide, some passages of which were testamentary. The vessel was subsequently lost at sea. He was held to be a mariner at sea, and upon proper proof of his handwriting and of the facts probate was granted: *Parker*, 2 Sw. & Tr. 375.

It will be observed that if there is any doubt or uncertainty about the application, the Court will order the next of kin or other interested person to be cited. The question will then be disposed of, if there is opposition to the grant, under the rules for contentious business.

## CHAPTER IX.

### ALTERATIONS.

The Wills Act, 1 Vict. ch. 26, sec. 21, enacts that no obliteration, interlineation or other alteration made in a will after the execution thereof, shall be valid or have any effect, except in so far as the change has rendered the former words no longer apparent, unless executed in the same manner as a will. The signature of the testator and of the witnesses must be made in the margin, or on some other part of the will near to or opposite to the change, or at the foot or end of, or opposite to, a memorandum at the end or on some other part of the will referring to such alteration. This section has been re-enacted in the several provinces.

Alterations made before the execution of the will are valid without such verification. The section deals only with changes made *after* execution.

An alternation made afterwards, even though made by the testator himself, is ineffectual. In the absence of all direct evidence as to the time of making alterations and erasures, the presumption of law is that they were made after execution, and probate of the will must be granted in its original form so far as that can be ascertained: *Cooper v. Bockett*, 4 Moo. P.C. 419; *Doe d. Shallcross v. Palmer*, 16 Q.B. 747.

See also *Williams v. Ashton*, 1 Johns. & Hem. 115, in which it is said that the *onus* is cast on the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed.

Declarations of his testamentary intentions, made by the testator before executing the will, are evidence to shew that such intention is embodied in the altered form of the will, and that the alteration was not an after thought. Declarations made by

him after execution are inadmissible: *Doe d. Shallcross v. Palmer*, 16 Q.B. 747; *Stainer v. Stewart*, 2 Sw. & Tr. 320. The name of an executor written on an erasure in the will and unattested, was admitted to probate on the declaration of the testator as to who his executor was, made before the execution of a codicil which referred to the will by its date: *Sykes*, 3 P. & D. 26. But declarations written and oral made by the testator, either before or after the execution of his will, are in the event of its loss evidence of its contents: *Sugden v. Lord St. Leonards*, 1 P.D. 154. Where the alterations are of trifling importance slight evidence will be sufficient to rebut the presumption that they were made after execution. The affidavit of an expert that in his opinion alterations in a holograph will were written at the same time as the rest of the will, was sufficient to entitle the alterations to probate as a part of the will in *Hindmarsh v. Hindmarsh*, 1 P. & D. 307. The Court may come to that conclusion upon any reasonable evidence, without insisting upon the oath of the attesting witnesses, or any other particular species of evidence: *Ib.*, p. 308.

If alterations, interlineations or obliterations, have been made after execution, and without proper attestation, the will stands in its original form, except in so far as that form cannot be ascertained, by reason of the change having obscured it. Glasses may be used to find what the obliterated words were; chemical agents cannot be resorted to in order to remove any portion of the obscuring ink; nor will a piece of paper pasted over the original writing to efface it, be removed to discover the words so effaced. The word "apparent" in the section means apparent on the face of the instrument, in the condition in which it was left by the testator: *Horsford*, 3 P. & D. 211. If experts using magnifying glasses can decipher the original words and satisfy the Court that they have done so, the words are still "apparent," but it is not allowable to resort to any physical interference with the document so as to render clearer what was written upon it.

If words obscured by pasting paper over them, can be read by experts by placing brown paper around them and holding the document against a window so that the light passes through the obliteration, they are "apparent" within the meaning of the section: *Ffinch v. Combe* (1894), P. 191. The instructions given by the Court to the expert who at the request of the parties was appointed to report upon what could be read beneath the pieces of paper pasted on, contained a direction that "on no account must chemicals, inks, or anything of the kind be used on the document, nor must the slips pasted on be removed, or the document itself affected in any way": *Ib.*, p. 190. The Court will not in the first instance take upon itself to decide, in any case of difficulty or doubt, whether the obliterated words can or cannot be made out. The question if raised must be referred to proof, and the Court will decide upon evidence: *Townley v. Watson*, 3 Curt. 739.

If the words and effect of the will before such alteration are not apparent, probate must be granted as if there were blanks in the will: *Ibetson*, 2 Curteis 337.

If the alteration is not a mere obliteration, but a substitution, the Court is at liberty to inquire whether the testator did not intend to revoke the original bequest only, on the supposition that he had effectually substituted another. The doctrine of dependent relative revocation is then applicable. The question is whether the destruction or obliteration was intended to be dependent on the efficacy of the substituted disposition; but where that is clear, the nature or extent of the contemplated alterations are immaterial. The Court will then apply the doctrine of dependent relative revocation, and will have recourse to any means of legal proof to establish what the obliterated words were. This principle was applied to a case where the testator had so entirely erased the name of a legatee that it was no longer apparent, and substituted another name for it. The Court received extrinsic evidence to shew what the original name was and restored it in the probate: *McCabe*, 3 P. & D. 94.



## CHAPTER X.

### REVOCATION.

A will, in order to be admitted to probate, must not have been revoked. It is, therefore, necessary to consider the ways in which a will may be revoked. It is of the essence of a will, that it be a revocable instrument. No expressions that he can use in the will, and no contract that he can make, can deprive the testator of the power of revocation. The contract may, however, be enforceable in equity against his estate: *Fortescue v. Henreab*, 19 Vesey. 443; *Chester v. Urwick*, 23 Beav. 407; *Hammersly v. De Biel*, 12 Cl. & F. 45. Damages may be recovered for the breach of such a contract: *Re Parkin, Hill v. Schwarz* (1892), 3 Ch. 510; *Robinson v. Ommañney*, 23 Ch. D. 285. A contract made by one who has merely a testamentary power of appointment, to exercise the power in a particular way, cannot be specifically enforced; but damages may be recovered for the breach of the contract: *Re Parkin* (1892), 3 Ch. 510; *Re Bradshaw* (1902), 1 Ch. 436; *Zaiser v. Lawley* (1903), A.C. 411.

An expression of an intention to make a testamentary disposition of property, which does not amount in law to a contract, is not binding, although such representations were intended to be, and were acted on: *Maddison v. Alderson*, 8 A.C. 467.

The modes of revocation which are effective under the statute are (1) by the subsequent marriage of the testator, (2) by a subsequent will or codicil which either expresses an intention to revoke or is so inconsistent with the earlier will that no part of the earlier will can subsist with the later document, or (3) by the burning, tearing or otherwise destroying the same by the testator or by some other person in his presence and by his direction, with the intention of revoking the same.

(4) There may also be a condition contained in the will itself which operates as an implied revocation.



Marriage is, under the statute, a revocation of a will made before the marriage. The Ontario Statute provides that "every will made by any person dying on or after the 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases, namely:—

(a) Where it is declared in the will that it is made in contemplation of such marriage;

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death in the office of the Surrogate clerk at Toronto;

(c) Where the will is made in the exercise of a power of appointment, and the real or personal estate thereby appointed, would not in default of such appointment pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions.

But the will of any testator who died between the 13th day of December, 1868 and the 13th day of April, 1897, is revoked by his subsequent marriage unless within the exception contained in clause (c).

It is to be observed that the phrases "next of kin" and "next of kin under the Statute of Distributions" are not synonymous: *McVicar*, 1 P. & D. 671.

Where a will is partly in pursuance of such a power of appointment, and deals in part with the testator's property generally, so much of it as is within the statute will be upheld, and probate or administration with the will annexed will be granted, limited to the property over which the testator had the power of appointment: *Russell*, 15 P.D. 111.

The Wills Act, 1837, contains only one of these exceptions to the general rule that marriage revokes the will. A testamentary power of appointment, where the property thereby appointed would not in default of such appointment descend to the heir, customary heir, executor, administrator or next of kin of the

testator under the Statute of Distributions, is not revoked by the subsequent marriage of the appointor.

We have already considered the effect of unattested obliterations as a partial revocation of the testamentary instrument in which they occur. The language of the statute in regard to burning, tearing or otherwise destroying, relates to partial as well as to total, destruction.

“Or otherwise destroying” means modes of destruction *ejusdem generis*, as cutting, throwing into water and the like, but not cancelling: *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Seripps*, 2 Robert. 563. Thus cutting off the name of the testator or of the attesting witnesses, *animo revocandi*, is effectual. Intention to destroy and actual destruction must co-exist. Neither without the other is sufficient. Drawing one’s pen through his will and writing upon it “This is revoked” is not a compliance with the statute, and is ineffectual: *Cheese v. Lovejoy*, 2 P.D. 253. Total destruction of the will is not necessary. There must be such an injury with intent to revoke as destroys the entirety of the will: *Doe v. Harris*, 6 A. & E. 209. Tearing off the seal of a will, *animo revocandi*, is sufficient as a destruction of its entirety: *Price v. Powell*, 3 H. & N. 341. Where a will is signed on each sheet and these signatures are referred to at the end of the will, cutting off the signatures on the earlier sheets and cancelling the signature on the last sheet is an effectual revocation: *Harris*, 3 Sw. & Tr. 485. The same result is attained by tearing off the signatures and attestation: *Lewis*, 1 Sw. & Tr. 31. Though each sheet of the will be signed by the testator and the attesting witnesses, the destruction of the last sheet revokes the whole will: *Gullan*, 1 Sw. & Tr. 125. A will torn twice through by the testator in a sudden outburst of passion against a beneficiary was, nevertheless, not revoked thereby, the testator having, while yet in the act, been dissuaded from further destruction, which he had intended: *Doe v. Parkes*, 3 B. & A. 489. So, too, a will torn up by the testator under the mistaken impression that it was invalid, was

not thereby revoked. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will: *Giles v. Warren*, 2 P. & D. 401.

The "burning, tearing or otherwise destroying," if not done by the testator, must fulfill two conditions. It must be done (1) in his presence, (2) by his direction. A draft copy of a codicil, the original of which was burnt by the testator's orders, but not in his presence, was admitted to probate: *Dadds*, Dea. & Sw. 290. The destruction of the will in the presence of the testator, but without his consent or authority, is not an effectual revocation. It is doubtful if the language of the testator subsequently used can amount to a ratification of such an act so as to give it validity: *Mills v. Mellward*, 15 P.D. 20.

A part of a will may be revoked by burning, tearing or otherwise destroying. For example, the cutting out of the names of the executors, by the testator, revoked the appointment of executors, and there being no appointment by the tenor of the will, administration was granted with the will annexed: *Maley*, 12 P.D. 12. The removal of three sheets from the middle of a will consisting of five sheets, operated as a total revocation of it: *Treloar v. Lean*, 14 P.D. 49. The intention with which the act is done, as shewn by the testator's declarations, by the condition of the instrument, or by inference from proved circumstances, determines what part of the will is revoked, or whether there is a total revocation: *Clarke v. Scripps*, 2 Robert. 563; *Woodward*, 2 P. & D. 206.

As the intention of the testator in the act of destruction is important, he must be mentally competent to judge of the character and effects of his act. This he could not be if he were insane, or delirious: *Scruby v. Fordham*, 1 Add. 74; *Brand*, 3 Hagg. 754; *Brunt v. Brunt*, 3 P. & D. 37; *Borlase v. Borlase*, 4 Notes of Cases 106.

If the testament was in the custody of the testator himself, and it is found amongst his papers mutilated or defaced, it is

presumed that he himself did the act: *Lewis*, 1 Sw. & Tr. 31. And that, too, with the intention of revoking it: *Bell v. Fothergill*, 2 P. & D. 148. But this presumption may be rebutted by evidence, and for this purpose the declarations of the testator after the execution of the will are admissible: *Sugden v. St. Leonards*, 1 P.D. 154; *Johnson v. Lyford*, 1 P. & D. 546; *Whiteley v. King*, 17 C.B.N.S. 756. The presumption does not arise where the testator died insane: *Sprigge v. Sprigge*, 1 P. & D. 608; before it can rise there must be satisfactory evidence that the will, if not found, was not in existence at the time of the testator's death. The evidence to rebut the presumption must be clear and satisfactory: *Eckersley v. Platt*, 1 P. & D. 281. Destruction under compulsion or without the testator's authority does not revoke the will: *Leigh* (1892), P. 82.

The circumstances may be such as to cast the burden of shewing that the cancellation was the act of the testator, and with what intention it was done, upon those who oppose the grant of probate: *Hitchings v. Wood*, 2 Moo. P.C. 355.

Where a will is in duplicate the destruction of one copy by the testator, or in his presence and by his direction, with the intention of revoking the will, is an effectual revocation. His intention, if he destroys one copy, will be presumed to be to cancel the will. If only one copy is in his possession the presumption is a strong one, it is less strong if he has both copies and only destroys one. The declarations of the testator are evidence of his intention: *Pemberton v. Pemberton*, 13 Ves. 303; *Roberts v. Round*, 3 Hagg. 548.

The declarations of the testator are not admissible to prove the execution of his will in duplicate, that must be proved in the same way as the execution of a will; nor are they admissible to shew that one of the duplicates has been wholly destroyed: *Atkinson v. Morris* (1897), P. 41.

The Wills Act, 1837, provides that no will shall be revoked



by any presumption on the ground of an alteration in the circumstances of the testator.

There may be what is known as a dependent relative revocation.

The principle commonly so known is thus laid down in *Ex parte Lord Ilchester*, 7 Ves. 373: "Where a disposition is made, so as to have legal effect, and afterwards another by which the former would be revoked, but the other substituted, and it is evident, that the testator, though using the means of revocation could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation." Cancellation under a mistake of fact is not effective, but neither is cancellation under a mistake of law. Lord Ellenborough in *Perrott v. Perrott*, 14 East. 440, uses this language: If a man cancel his will under a mistake in point of fact, that he has completed another, when he really has not, as was the case in *Hyde v. Hyde*, the cancellation is void; and if he cancel it, under a mistake in law, that a second will (complete as to the execution) operates upon the property contained in the first, when from some clerical rule it really does not; shall this be deemed a valid cancellation? If a man, under the misapprehension that a second will is validly executed when it is not, tears his name off the first will, the first will is still valid: *Onions v. Tyrer*, 1 P. Wms. 345.

In *Hyde v. Hyde*, 1 Eq. Cas. Ab. 409, the testator had torn the seals from his old will under the erroneous impression that he had validly executed a draft of a new will so as to pass lands. This was held to have been done *sine animo cancellandi*; and therefore to be no revocation of the original will.

In *Applebee*, 1 Hagg. 143, an executor had marked alterations in pencil, under the direction of the testator, who then cancelled it only for the purpose of having another drawn up,



but died before it could be done, such cancellation was deemed preparatory to the making of a new will, conditional only, and not a revocation.

It sometimes happens even that a subsequent will, made under a mistaken notion of facts, which is the foundation of his wish to change the disposition of his property, fails to cancel an earlier will. Thus if one had made a devise to his son, and by a later will devised the property to a woman to whom he was married, and whom he supposed to be his wife, but who had a husband living at the time of such marriage and it appeared that the ground of the devise was the fact that she was his wife, such devise would not revoke the former will: *Kennell v. Abbott*, 4 Ves. 802.

Before the passing of the Wills Act, 1 Vict. ch. 26, the principle was affirmed in the courts that the codicil fell to the ground with the will when the will was revoked; but that if it could be established that the testator intended the codicil to stand by itself, notwithstanding the revocation of the will, then the Court would give effect to the codicil. But since section 20 of the Wills Act was passed, the modes by which a will or codicil can be revoked have been very strictly prescribed. The Court cannot, in the teeth of the language of that section, lay down the proposition that a codicil is revoked by the mere fact of the revocation of the will: *Black v. Jobling*, 1 P. & D. 685; *Savage*, 2 P. & D. 78. Some of the earlier cases since The Wills Act, were decided on the assumption that the old state of the law still continued, but they are overruled by the later decisions. Now the law is that once a testator has executed a testamentary paper, that paper will remain in force unless revoked in the particular manner named in the statute. Even when by reason of references in the codicil to the terms of the will, the codicil by itself is in great part unintelligible, the codicil must, notwithstanding the destruction of the will, be admitted to probate. The difficulties of construction thereby occasioned

are for the consideration of the High Court, and not of the Surrogate Court: *Turner*, 2 P. & D. 403.

In *Bleekley*, 8 P.D. 169, the testator had written a codicil on the same sheet of paper and at the foot of his will. The codicil appointed a different executor and in other respects confirmed the will. The testator revoked the will by cutting off his signature thereto, but did not in any way mutilate the codicil. The cutting was done in the belief that such mutilation revoked both will and codicil, and that intention was given effect to by the Court.

The last case and the expressions in *Sugden v. Lord St. Leonards*, 1 P.D., at p. 206, which, it was contended, indicated that the codicil falls with the will on which it is dependent, were discussed in *Gardiner v. Courthope*, 12 P.D. 14, and the doctrine of *Black v. Jobling* and *Turner*, *ante*, re-affirmed.

A man may, as oft as he will, make a new testament, even until his last breath. No man can die with two testaments; but two or more documents may co-exist as a last will and testament. The later will, if contrary to or inconsistent with the earlier will, revoke such first made will, even though the existence and contents of the later will have to be proved by oral evidence, and the second will has been revoked by destruction: *Brown v. Brown*, 8 E. & B. 876. But the making of a subsequent testamentary disposition does not revoke an earlier one unless there is a revocation in express terms, or the subsequent will is so inconsistent with the first that no part of the earlier can stand with the later. If the inconsistency is only partial, so much of the former will as is not inconsistent with the subsequent one, will stand: *Lemage v. Goodban*, 1 P. & D. 57; *Cadell v. Willcocks* (1898), P. 25.

Where, however, two testamentary documents are duly executed on the same day and occasion, and practically simultaneously, and the circumstances are such as to lead to the inference that both are intended to be effective, then though there are

apparent inconsistencies both will be admitted to probate, unless they are so inconsistent that they cannot stand together; and in determining that question the Court will, so far as possible, read the words of the documents so as to support the admissibility of both to probate, even though the construction be one which the Court would not otherwise have arrived at: *Townsend v. Moore* (1905), P. 66.

If the second will, no matter how limited its scope, in express terms revokes all former testamentary dispositions, even though the testator is assured at the time of the execution of the second will that owing to its limited purpose, it will not revoke the first, and he relies on that assurance, nevertheless the first will is thereby revoked. The fact that the will has been read over to the testator or the contents otherwise brought to his notice, should, when coupled with the execution thereof, be held conclusive evidence that he approved of as well as knew the contents thereof: *Collins v. Elstone* (1893), P. 1; *Morell v. Morell*, 7 P.D. 68.

In *Cutts v. Gilbert* (1854), 9 Moo. P.C. 131, it was established that the words "This is my last will and testament" in a later will do not of themselves revoke an earlier will, for they do not necessarily import a different disposition of the property. In this case the second will was not forthcoming at the testator's death, there was no evidence either of its destruction or of its contents. It also decided that the burden of proof is on him who sets up the second will as a revocation of the first; that parol evidence of the execution of a will not produced, in the absence of the draft or instructions, must be strong and conclusive, that it having been in the testator's custody the presumption is that he destroyed it, *animo revocandi*.

If the subsequent will professes to deal with the whole of the testator's property, so that it is thereby inconsistent with the first, the earlier will is revoked by the later, even though the earlier will appoints executors and the subsequent one does not: *Henfrey v. Henfrey*, 4 Moo. P.C. 29.

The fact that the second will deals with the whole of the property is a revocation of the first one even as to the appointment of executors, though the later will was silent regarding executors: *Ib.*; *Turnaur*, 56 L.T. 671.

If, however, the subsequent will is only partly inconsistent with the earlier one, so much of the earlier testament as is not inconsistent with the later one, will, in the absence of an express clause of revocation in the later document, be entitled to probate along with the later document, both together forming the last will and testament.

Thus the testatrix, after some small legacies, left the residue of her estate to her daughter and appointed her executrix. By a later testamentary instrument she gave the whole property to her daughter for life and made her sole executrix, and gave larger legacies to others upon the death of the daughter, but made no disposition of the residue. The two instruments were together admitted to probate: *Petchell*, 3 P. & D. 153.

If the earlier will is only partly revoked by the later will, and the later will is afterwards cancelled by the testator, the unrevoked portions of the earlier will are entitled to probate, the cancellation of the second will not having the effect of reviving the revoked portions of the earlier one: *Hodgkinson* (1893), P. 339. Where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally distinct: *Kellett v. Kellett*, L.R. 3 H.L. 167. See also *Re Wilcock* (1898), 1 Ch. 95. The legal effect of a codicil is to confirm such parts of the will to which it refers, as it does not revoke. A codicil to a will absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians of infants in the will. The will was in consequence admitted to probate along with the codicil: *John Howard*, 1 P. & D. 636. Compare *Collins v. Elston* (1893), P. 1.



If upon the face of a testamentary document and the facts known to the testator at the time of its execution, it is doubtful whether the testator intended altogether to revoke a former will, parol evidence is admissible to ascertain the fact: *Jenner v. Finch*, 5 P.D. 106; *Thorne v. Rooke*, 2 Curt. 799.

An appointment made by will in pursuance of a power is revoked by a general clause of revocation in a second will, whether the power of appointment is special or general: *Sotheran v. Dening*, 20 Ch. D. 99; *Re Kingdon*, *Wilkins v. Pryer*, 32 Ch. D. 604.

An appointment made by will in exercise of a general power is revoked by a general disposition of all the testator's property by a subsequent will. But if the power is special, the appointment must be revoked by a general clause of revocation, or an express reference to the power, or by a disposition of some part of the property which is the subject of the power: *Sotheran v. Dening*, 20 Ch. D. 99; *Re Kingdon*, 32 Ch. D. 604; *Eustace*, 3 P. & D. 183; *Re Tenney*, 45 L.T.R. 78; *Cadell v. Willcocks* (1898), P. 25.

Two inconsistent wills of the same date, or without date in the absence of all evidence as to which of them is the later, are both necessarily void; but the Courts will reconcile them, if at all possible to collect a consistent disposition from the whole: *Phipps v. Earl of Anglesea*, 7 Bro. P.C. 443.

It is to be observed that under the statute the writing which effects the revocation of a will must not itself necessarily be a will, though it must be executed with the formalities requisite to the validity of a will. Thus a testator, having obliterated the whole of a codicil, including his signature, by thick black marks, at the foot of it wrote and signed the words, "We are witnesses of the erasure of the above," and had his signature attested by two witnesses, the words were, "a writing declaring an intention to revoke" within the statute, and the codicil was thereby revoked: *Galing*, 11 P.D. 79.



A letter signed by the testator and attested by two witnesses, was sent by him desiring the destruction of his will, which was thereby revoked: *Durance*, 2 P. & D. 406.

A will may be contingent or conditional. It may be so framed that it takes effect only on the happening of a certain event, or on the assent of some person other than the testator: *Smith*, 1 P. & D. 717. A person intending a journey to Ireland made his will thus: "If I die before my return from my journey to Ireland, that my house and lands," etc. The testator went to Ireland, returned, and lived for a number of years after. The will was therefore void, as the contingency on which it was to take effect did not happen: *Parsons v. Lance*, 1 Ves. Sen. 190; *Lindsay v. Lindsay*, 2 P. & D. 459. Such conditions are construed cautiously by the Courts, and with reluctance to defeat the testamentary intention: *Burton v. Collingwood*, 4 Hagg. 176.

By the Wills Act, 1837, sec. 22, no will or codicil, or any part thereof, which has been revoked in any manner, can be revived in any other way than by re-execution, or by a codicil duly executed, and shewing an intention to revive.

If a will has been revoked by a later testamentary instrument it is not revived by the revocation of the later document. In *Hodgkinson* (1893), P. 339, the testator by his will gave all his property to A., and made her sole executrix. He afterwards made a second will devising all his real estate to B. and appointed her sole executrix; but he did not expressly revoke the first will. He revoked the second will by cutting off his signature, and then he died. The first will was not wholly revoked, and had therefore to be proved; but so much of it as related to the real estate was revoked by the second will. When the testator destroyed the second will, *animo revocandi*, the revoked part of the first will was not thereby revived; but the operation of the second will in revoking the first will as to the real estate still remained. Probate was accordingly limited to so much of the

testator's property as was not comprised in the second will. See also *Brown*, 4 Jurist. N.S. 244.

If a testator destroys a later will with the express intention of reviving an earlier will which the later one has revoked, such destruction is wholly ineffectual. It does not revive the earlier will, for it is not a compliance with the statute. It does not revoke the later will, for the doctrine of dependent relative revocation applies. The destruction of the second will, being intended to revoke it solely for a purpose which failed, has not the effect of cancelling it: *Powell v. Powell*, 1 P. & D. 209.

## CHAPTER XI.

### THE REVIVAL OF WILLS.

A revoked will which has been duly revived may be admitted to probate.

“No will or codicil, or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and where any will or codicil which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shewn”: Imp. Act. 1 Viet. ch. 26, sec. 22; R.S.O. 1897, ch. 28, sec. 24.

It not infrequently happens that a revoked will is thereafter revived. Since The Wills Act revival can be effected in two ways only, by re-execution or by a codicil shewing an intention to revive.

The re-execution which is sufficient to revive a will is such an execution as in the case of a first execution would have made a valid will.

What amounts to re-execution of a will? It seems obvious that re-execution must comply with all the requisites for the execution of a will in the first instance. The signature of the testator and of two other persons, all the signatures being affixed in the presence of all three, will not be sufficient as a re-execution if it was not the intention that what took place should be a re-execution. If the evidence shews that it was intended as a re-execution there is nothing to prevent its having that effect: *Dunn v. Dunn*, 1 P. & D. 277.

A codicil may, by referring in adequate terms to a revoked

will, revive that will if it be in existence, but the codicil must "shew an intention to revive the same." Such intention to be of effect must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, as by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court with reasonable certainty the existence of the intention. A will cannot be revived by mere implication, except in the case of a latent ambiguity extrinsic evidence is not admissible to shew the testator's actual intent. The Court ought, however, always to receive such evidence of the surrounding circumstances as by placing it in the position of the testator will the better enable it to read the true sense of the words he has used: *Steele*, 1 P. & D. 576. A mere reference to a previous testament by date is not by itself sufficient to revive it: *Dennis* (1891), P. 326. In order to revive an earlier will, it must still be in existence. It cannot be revived if it was destroyed before the execution of the testament which intended to revive it: *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *Reade* (1902), P. 75; *Steele*, 1 P. & D. 575.

If a will has been revoked by a later testamentary instrument it is not, therefore, capable of being revived by the revocation of the instrument which revoked it: *Brown*, 4 Jurist. N.S. 244. This principle is illustrated in the case of *Hodgkinson*, [1893] P. 339. There the testator had made a will by which he left all his property to a friend, by a later will he devised his real property to his sister. Thereafter he made a third testamentary instrument by which he revoked the second will. None of the later wills revoked the first one, except in so far as it was revoked, as regards the real property, by the different disposition made of the lands by the second will. That, however, revoked the devise of the lands in the first will, and the revocation of the second will had not the effect of reviving such devise. Accordingly probate of the first will was granted,

but limited to the personal property, and there was an intestacy as concerning the lands.

So, too, the burning of the second will with the declared intention of reviving the first one is ineffectual for that purpose: *Dickinson v. Swalman*, 30 L.J.P. 84.

As a will can only be revived in the ways sanctioned by the Act, it follows that where a testator had cut out his signature with the intention of revoking his will, and afterwards pasted it in its original place, the will was not revived: *Bell v. Fothergill*, 2 P. & D. 148.

The theory of the law before the passage of The Wills Act was that the codicil forms a part of the will, that consequently to make a codicil to your will is to affirm the existence of that will and to re-publish it or to affirm its validity. Before the passing of the Act the Court inferred from the making of a codicil that the testator intended to re-affirm his will, and, if the will had been revoked, by re-affirming it, to revive it. As soon therefore as it was ascertained that the codicil in question was a codicil to a particular revoked will, that will was deemed to be revived. But in The Wills Act the Legislature intended that the "intention to revive" the revoked will should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. It was intended to do away by the statute with the revival of wills by mere implication: *Steele*, 1 P. & D. 575. In *Marsh v. Marsh*, 1 Sw. & Tr., at p. 533, it is said that it appears to have been the object of the Legislature to put an end equally to implied revocations and implied revivals.

The reference in a codicil to the date of a former will has been held in numerous cases not to shew an intention to revive such former will: *May*, 1 P. & D. 581; *Steele*, *ante*; *Dennis*, [1891] P. 326; *Wilson*, 1 P. & D. 582. The point



was discussed in *McLeod v. McNab*, [1891] A.C. 471, in which the Nova Scotian Statute was under consideration. It was there said that a mere reference to the document intended to be dealt with, whether will or codicil, by its date, is not sufficient to revive it. The date is an important element in the consideration, but it is not to be taken by itself, it becomes necessary to look at the context, and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition to the document of that date or to extend it to something more.

The question was whether a residuary bequest revoked by a codicil to the will, was revived by a second codicil which confirms the will in every other particular than as altered by such second codicil. It was held that "confirm" was an apt word to express the meaning of "revive," and that the language used shewed an intention to revive the residuary bequest which was revoked by the first codicil: *Ib.*

There can be no revival of a will which, at the time of the attempted revival, has no physical existence: *Rogers v. Good-enough*, 2 Sw. & Tr. 342.

It is often a question of great nicety whether a will is confirmed with unattested alterations made in it, or whether it is confirmed in its original form.

It is in each case a question of construction what the testator intends to confirm, whether the whole instrument as originally written, or only what remains of it after alterations and revocations. The intention is to be ascertained from the instrument which confirms and the circumstances surrounding it: *Re Hay*, [1904] 1 Ch. 319; *Tyler v. Merchant Taylor's Company*, 15 P.D. 216. In *Re Hay* three legacies were struck out of the will by drawing lines through them, the codicil confirming the will revoked one of these, but was silent as to the other two. That circumstance indicated an intention to confirm the unaltered will, except in so far as the codicil otherwise provided. In

*Tyler v. Merchant Taylor's Company* the will was confirmed as changed by the unattested alterations.

In *Heath*, [1892] P. 253, a reference in the codicil to the amount of a legacy was consistent only with the incorporation of the alterations, and they were therefore included.

Though a codicil reviving a will operates as a re-publication of the will, and thereafter it is to be taken as if executed at the date of such revival, the date of the will may still be a factor in determining the construction of the will: *Hopwood v. Hopwood*, 7 H.L.C. 728; *Mountchashell v. Smyth*, [1895] 1 Ir. R. 346.

It may be noted that a bequest invalid by reason of the beneficiary or the spouse of the beneficiary having been one of the witnesses to the will, is rendered valid by the confirmation of such will by a later testamentary instrument attested by other witnesses: *Anderson v. Anderson*, L.R. 13 Eq. 381.

It may be observed that the destruction of a testamentary instrument with the sole purpose of thereby reviving an earlier instrument, while ineffectual as a revival of the former testament, does not revoke the instrument so destroyed under the mistaken idea in regard to the effects of destruction. The act is referable, not to any abstract intention to revoke, but to an intention to validate another paper, and as the sole condition on which revocation was intended is not fulfilled, the *animo revocandi* is not present: *Powell v. Powell*, 1 P. & D. 209.

## CHAPTER XII.

### THE APPOINTMENT OF EXECUTORS.

Swinburne, Pt. IV., sec. 2, pl. 2, says: "To appoint an executor is to place one in the stead of the testator, who may enter into the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels towards the payment of the testator's debts, and the performance of the will."

Blackstone defines an executor as the person to whom the execution of a last will and testament is, by the testator's appointment, confided.

Previous to 1886 in Ontario, when The Devolution of Estates Act was passed, and to 1898 in England when The Land Transfer Act, 1897, took effect, the executor as such dealt only with the testator's goods. Under these enactments the testator's lands also devolve upon the executors for the purposes specified in the respective statutes. Probate and letters of administration may now be granted in respect of real estate only, although there is no personal estate.

The mere appointment of an executor, without any devise of lands or bequests of goods to any person, or appointing anything to be done by the executor, is sufficient to constitute a will, and entitle it to probate. See *Brownrigg v. Pike*, 7 P.D. 61.

Prior to The Land Transfer Act, 1897, in England, or The Devolution of Estates Act in Ontario, administration with the will annexed or probate could not have been granted of a will which neither bequeathed personal property nor appointed an executor: *Booth*, 3 P. & D. 117. It was contrary to the practice of the Court to admit to probate a will relating wholly to real property: *Drummond*, 2 Sw. & Tr. 11.

**Who May be an Executor.**—It seems to be admitted that the Sovereign may be an executor; in which case he appoints some person to act in the premises, and to answer the suits of those who have claims against the estate.

A corporation aggregate may, it seems, be an executor.

A firm may be nominated by a will as its executors, and probate will then be granted to the members of the partnership individually: *Fernie*, 6 Notes on Cases 659.

As aliens have now the same right to take, hold and convey property as natural-born subjects, they are now capable of being executors.

An infant may be appointed an executor no matter how young, or even if unborn at the time the will is executed. But if an infant be appointed *sole* executor, by 38 Geo. III. ch. 87, sec. 6; R.S.O. 1897, ch. 337, sec. 34, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the Surrogate Judge shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. Such administrator has the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin: *Stewart*, 3 P. & D. 244. See *Merchants Bank v. Monteith*, 10 P.R. 334; *Cummings v. Landed Banking & Loan Co.*, 20 O.R. 382.

At common law a married woman could be an executrix or administratrix only by consent of her husband. But now the various Acts passed in regard to married women, have given them as great capacity to contract, sue, and be sued, and to hold and convey property, real and personal, as if they were unmarried. Under the former state of the law if a *feme sole*, being an executrix or administratrix, wasted the goods of the estate, and then married, her husband was liable during the coverture for the *devastavit* or breach of trust: *Palmer v. Wakefield*, 3 Beav. 227.

It made no difference whether the husband had or had not received a portion with his wife: *Adair v. Shaw*, 1 Sch. & Lef. 263. If the husband took out administration to his wife's estate he was liable as her administrator, by 30 Car. II. ch. 7, which rendered the executors and administrators of an executor, whether rightful or of his own wrong, liable for the waste or conversion of the property of which the latter were executors or administrators. R.S.O. 1897, ch. 337, secs. 16-17.

The husband was liable, both at law and in equity, so long as he and his wife were both alive, for the acts of his wife as executrix even though living separate: *Paget v. Read*, 1 Vern. 143.

Sir John Romilly, M.R., thus sums up the law as it stood before the changes effected by the various Acts relating to married women's property. "It is now settled law that a husband is liable for all the assets received or *devastavit*s committed, either by himself or his wife, during the coverture, in respect of an estate of which his wife was legal personal representative, and that, in this respect, the husband is liable at law during his life and his estate after his death": *Smith v. Smith*, 21 Beav. 385. See also *Adair v. Shaw*, 1 Sch. & Lef. 243. The effect of 47 Vict. ch. 19 (O.), now R.S.O. ch. 163, sec. 17, is, in a great measure, to relieve the husband of liability for his wife's wrongs, except to the extent that he has received property by her. There is, however, an express continuance of the liability of the husband in the case of persons married before the 1st day of July, 1884: *Traviss v. Hales*, 6 O.L.R. 574; *Earle v. Kingscote* (1900), 2 Ch. 585; *Seroka v. Kattenburg*, 17 Q.B.D. 177.

As executors act *in auter droit*, and for the benefit of the estate of the deceased testator, they were not disqualified by crime. An executor who, after the testator's death, was convicted of felony, was, nevertheless, qualified to maintain an action to establish the validity of the will of which he was named executor: *Smethurst v. Tomlin*, 2 Sw. & Tr. 143. But see *Re Mauder*, 6 Q.B. 867. Since the abolition of outlawry and of



attainder, escheat and forfeiture for crime, the subject has ceased to be of practical interest. See the Criminal Code, 1892, sections 962, 965.

Probate cannot be refused, on account of his poverty or insolvency, to an executor named in a will: *Hathornthwaite v. Russel*, 2 Atk. 126.

In the case of a bankrupt or insolvent executor who was not known to be such by the testator, a receiver of the estate will be appointed. But if the testator *knew* of the insolvency at the time of making his will, a receiver will not be appointed on the ground of insolvency alone: *Gladdon v. Stoneman*, 1 Madd. 143 (note). If the will has been made some time before the insolvency of the person named as executor, the Court will not infer an intention to appoint an insolvent, from the failure to alter the will later: *Langley v. Hawke*, 5 Madd. 46. The receiver, when appointed, will be given power to bring suits in the name of the insolvent executor: *Dowd v. Hawtin*, 19 Ch. D. 61.

An executor derives his office only from a testamentary appointment. He may be named by a will or codicil as executor, or the instrument may commit to him the powers, duties and obligations attendant upon the office in which case he is executor according to the tenor of the will. In order to constitute one an executor according to the tenor of a will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses and discharge the legacies contained in such will: *Adamson*, 3 P. & D. 253; *Wilkinson* (1892), P. 227. If the testator has given a general direction for the payment of debts, and then gave all his personal estate to trustees to convert into money, and divide it amongst the legatees, such trustees are executors according to the tenor: *Bayles*, 1 P. & D. 21. A gift by the testator to persons whom he names, of all his real and personal estate to apply the same after payment of debts to payment of specified legacies, makes the persons so named executors according to the tenor. They were appointed to collect the assets and

pay the debts and legacies, upon the true construction of the language used: *Bell*, 4 P.D. 85. For that purpose directions to get in the estate of the testator, and to distribute it in a certain manner after the payment of all funeral and other expenses is sufficient: *Lush*, 13 P. & D. 20; *Punchard*, 2 P. & D. 369; *Fraser*, 2 P. & D. 183.

Where no executors are appointed, but the will appoints trustees, gives directions to the "executors" to pay debts, and as to the residue, and the language of the will indicates that the words "executors" and trustees were used indifferently in reference to the same persons, the trustees were held to be executors according to the tenor: *Earl of Levan*, 15 P.D. 22.

Unless the Court can gather from the words of the will that a person named therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof: *Punchard*, 2 P. & D. 369.

But direction given to trustees, by the testator, "to carry out this will" and "for the due execution of this my will" are within the principles that where the direction is to carry out the general provisions of the will, and not to execute a specific trust, the trustees are executors according to the tenor: *Russell*, [1892] P. 380.

The sole devisee and legatee of a testament in which no executor is named is not thereby entitled to probate as executor according to the tenor; but only to administration with the will annexed. The Land Transfer Act, 1897, which causes the testator's land to devolve upon and become vested in the personal representative to be by him administered in the same way as personalty, has made no change in the practice which has been followed for more than a hundred years. That practice has been where some one is not named as executor in a will, and no duties are indicated in the will that would constitute him executor thereof according to the tenor, but who has such an interest that, in spite of not being named an executor he might be looked to to

act as such, has been not to grant probate, but to grant letters of administration with the will annexed: *Pryse* (1904), P. 301.

An executor may be appointed by necessary implication, as where the testator says, I will that A.B. be my executor, if C.D. will not; C.D. may, if he will, be admitted as executor, but if the testator make A.B. or C.D. his executor in this case they shall both be executors, for "or" shall be read "and": *Godolph*, Pt. 2, ch. 5, sec. 3. The same will may appoint an executor in express terms, and others by implication according to the tenor. Thus: "I appoint my sister A.B. my executrix, only requesting that my nephews C.D. and E.F. will kindly act for and with this dear sister" is sufficient to constitute C.D. and E.F. executors according to the tenor along with A.B.: *Brown*, 2 P.D. 110.

The testator may by his will authorize the legatees or some other persons to nominate executors, and probate will be granted to the persons so nominated: *Ryder*, 2 Sw. & Tr. 127; *Jackson v. Paulet*, 2 Robt. 344.

If there is an ambiguity as to the person named as executor, extrinsic evidence is admissible to shew who was intended, but it would seem that evidence of declarations by the testator tending to identify the person who was intended are not admissible; *Chappell*, [1894] P. 98.

When two persons are appointed sole executors, probate is granted to both: *Court*, 1 Sw. & Tr. 485.

The appointment of executors may be absolute, or it is limited as to (a) time, (b) place, or (c) the matter over which the executor is to have control, or (d) the appointment may be dependent upon a condition, or he may appoint substitutes as executors upon the happening of a contingency. Thus a man may appoint his son to be executor when he shall come of age, until the son attains his majority there is no executor; or he may appoint his widow until she re-marry: *Bond v. Faikney*, 2 Cas. temp. Lee. 371. Administration with the will annexed will be granted for the period before the duties of the executor under the will begin, or after they end.

He may appoint one set of executors for the country in which he lives, and another for each of several foreign countries. For example, a testator appointed a man resident in Portugal to be his executor in Portugal; such executor was held to be executor for Portugal and not to be entitled to probate in England: *Velho v. Leite*, 3 Sw. & Tr. 456. But if he makes two wills, one disposing of property abroad, and appointing executors there, and another disposing of his property at home, the papers may be taken as together constituting the last will and testament, and all the executors named in both documents will be entitled to probate: *Harris*, 2 P. & D. 83.

There may be one set of executors to deal with one class or kind of property, and another to deal with others. For instance, one may be appointed to deal with leases and estates, another for debts due him, and a third for a bond or other specialty owing to him. But one cannot by will appoint an executor whose sole duty it is to deal with the residue of the testator's estate not disposed of by will. The Court cannot grant probate to an executor who is precluded from dealing with the property which passes under the will: *Wakeham*, 2 P. & D. 395.

The will may make provision for substituted executors. Thus when a testator appointed his son his executor, but provided that in the event of his going abroad for more than two months B. shall be his executor, the son went abroad and remained there without taking probate. Probate was then granted to B., but the right was reserved to the son to prove the will: *Lane*, 33 L.J.P. 185. The will may provide that the substituted executor may take probate after the death of the instituted executor: *Foster*, 2 P. & D. 304.

A substituted executor cannot take out probate until the executor for whom he is substituted has been asked to accept or refuse: *Smith v. Crofts*, 2 Cas. temp. Lee. 557.

The appointment of an executor may be made contingent on the happening of some event. The contingency may be intended to arise before he acts as executor, or the continuance



of his executorship may itself be contingent. Thus there may be a direction to one to pay all debts he owes the testator, to the other executor, before he acts as executor: *Stapleton v. Truelock*, 3 Lean. 2, pl. 6.

The appointment of an executor may be void for uncertainty, as, for instance, the testator appointed one of his sisters as sole executrix. He had three sisters living at the time, two of whom died in his lifetime. It was impossible to infer from the language of the will which of the three was intended and probate was refused to the survivor: *Blackwell*, 2 P.D. 72.

**Executors by Transmission of Office.**—An executor, as such, cannot assign his office to another. But a probate does not necessarily expire with the death of the person to whom it is granted. An executor having received probate of his own testator's will, by that fact becomes executor of every will of whom such testator was the sole or last surviving executor, and there is no limit to the length of such chain of succession. There are two conditions imposed upon the application of this principle. The first is that each will shall have been duly proved in the Surrogate Court: *Fowler v. Richards*, 5 Russ. 39; *Gaynor*, 1 P. & D. 720. The second is that the grant of probate be not limited in its operation: *Boyne*, 1 Sw. & Tr. 132; *Martin*, 3 Sw. & Tr. 1. These principles are illustrated in the cases. In *Reid* (1896), P. 129, where probate of a will was granted to one of two executors, leave being reserved to make the like grant to the other, the acting executor died before having fully administered; the other executor had not been heard of for fourteen years. The heirs of the testator, with the assent of the executors of the deceased executor, who had acted, moved for a grant to herself of letters of administration *de bonis non*. But the grant was refused. Upon the failure of the executor to whom power was reserved, after citation, to take probate the chain of executorship continued in the executors of the acting executor without any fresh grant: *Noddings*, 2 Sw. & Tr. 15; *Re De Laronde*, 19 Grant 119.



A substituted executor may, however, by the terms of the will be entitled to probate on the death of the executor, so as to prevent the descent of the office: *Foster*, 2 P. & D. 304.

The will of a married woman which merely executed a power under a settlement, appointed an executor generally. She was herself the sole executrix of her deceased first husband. The general probate of the will of the married woman was held, even before the Acts enlarging the rights of married women, to transmit the chain of representation, and her executor became the personal representative of the deceased husband: *Barr v. Carter* (1797), 2 Cox Ch. 429.

In order to the continuance of the chain of executorship probate must have actually issued. If an executor die before probate, his executor is not thereby executor of the first estate. Letters of administration of it must be granted: *Day v. Chalfield*, 1 Vern. 200; *Isted v. Stanley*, 1 Dyer 372a; *Wankford v. Wankford*, 1 Salk. 21.

The executor of a testator cannot renounce the executorship of other persons of whom his testator may have been the sole or surviving executor. He cannot accept one part of the duties of an executor and refuse the rest: *Brooke v. Haymes*, L.R. 6 Eq. 25. It is the executor of the sole or surviving executor only, who represents the estate: *Brook v. Bloomfield*, 8 P.R. 267.

The administrator with the will annexed, of a deceased executor, has no privity or relation with the original testator, and in no way represents him. The chain of representation is broken. The administrator is merely the officer of the Court, and deals only with the estate of the person of whom he is administrator: *Bridger*, 4 P.D. 77.

The grant of administration with the will annexed, to the attorney for the executor, does not break the chain of representation, as a will proved by the attorney of an executor is the same thing as if actually proved by the executor: *Murguia*, 9 P.D. 236; and the executor's representatives are entitled to deal with the unadministered property of the testator.

At common law the renunciation of one executor in the life time of another was a nullity. It was not binding upon him unless made after he became the survivor: *Arnold v. Blencowe*, 1 Cox. Ch. 426. On the death of an executor who accepted probate, no interest was transmitted to his executor if any of those who refused were still alive. But The Court of Probate Act, 1857, sec. 79, provides that when a person who is appointed an executor by a will renounces probate, his rights in respect of the executorship wholly cease, and representation proceeds as though he had not been named executor: *Allen v. Parke*, 17 U.C.C.P. 105. See R.S.O. ch. 59, sec. 65.

Previous to the Acts enlarging the powers of married women it was usual to insert a limitation in the probate of the will of a married woman "to such property as the testatrix had a right to dispose of," and also "to such property as she has disposed of by her will." We have already noted that, upon a limited grant, the executorship is not transmitted. Since the statutes enabling married women to dispose of property as freely as if they were unmarried, these limitations are no longer inserted, and the probate is general: *Price*, 12 P.D. 137.

The Surrogate Courts of Ontario have the same jurisdiction in granting limited administration as the Ecclesiastical Courts had in England: *Thorpe*, 15 Gr. 76.

## CHAPTER XIII.

### EXECUTOR DE SON TORT.

An executor of his own wrong, commonly called an executor *de son tort*, according to the definition of the old writers, is, "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the Ecclesiastical Court to administer." If one who is neither executor nor administrator, intermeddles with the goods of the deceased, or in any way takes upon himself to discharge any of the functions or exercise any of the rights which appertain to the office of personal representative, he incurs liabilities as the executor of the deceased by his own wrong.

When, however, probate or administration has been granted to a personal representative before the wrongful acts of intermeddling have been committed, the intermeddler, though liable to the personal representative as a trespasser, is not thereby made executor *de son tort*. There being a representative of right against whom creditors and others may bring their actions, the law will not give them rights of action against the wrongdoer as executor *de son tort*: *Anon*, 1 Salk. 313. But, notwithstanding that there is a lawful executor or administrator, if any other person take the goods of the deceased person, expressly *claiming* them as executor, or makes payments or otherwise intermeddles in the *avowed* capacity of executor, then it would seem that he may be liable as executor of his own wrong: *Reid's Case*, 5 Co. 34. There is not wanting, however, express authority for the contrary proposition, that, even in such cases, there cannot be a lawful executor and an executor *de son tort* at the same time: *Hall v. Elliott*, Peake N.P.C. 87; *Tomlin v. Beck*, 1 Turn. & R. 438. In the last case it was held that a person who was permitted by the executor in his lifetime to take

possession of the assets, and who after the executor's death, applied them in the administration of the estate, was not executor *de son tort* of the person whose the assets were.

But one who gets the goods of the testator into his possession before the issue of letters of administration, may, after administration has been granted, be sued as *executor de son tort*: *Kellow v. Westcombe*, 1 Freem. 122. Very slight acts of intermeddling with the goods of a deceased person, when there is no legal personal representative, will make the person so intermeddling an executor *de son tort*.

Milking the cows, even by the widow of the deceased, the taking of a Bible, of a bedstead, of a dog, the killing of cattle, the using, the giving away or selling any of the goods, the entering upon land leased to the deceased and taking possession, claiming the particular estate, are all cited as acts each of which has been held sufficient to make the person who did it an executor *de son tort*: *Per Armour, J.*, in *Armstrong v. Armstrong*, 44 U.C.R. 615.

This is not to be understood as including acts of necessity or humanity. In a note to *Dyer*, 166*b*, a case is noticed of the widow milking cows, as not falling under that description.

Almost any intermeddling, after the death of the party, makes the person so intermeddling liable: *Edwards v. Harben*, 2 Term. Rep. 587. If a servant, or agent, under the direction, and in the employ of his master, or principal, sell the goods of the deceased person, even though such sales were also made by them, under the testator's orders in his lifetime, both master and servant, or principal and agent, are liable as executors *de son tort*: *Padget v. Priest*, 2 Term. Rep. 97; *Sharland v. Mildon*, 5 Hare 469. The fact that the agent has accounted to his principal, the principal being himself an executor *de son tort*, does not relieve the agent. The principle that the receipt of the agent is the receipt of the principal, does not apply to wrongdoers. The terms agent and principal are used for convenience though inaccurate, as both are liable as wrongdoers.

The case of *Sharland v. Mildon*, *ante*, shews that, if before administration is taken out, an agent is employed, the agency is not lawful so long as the employer is a wrongdoer. But if the employer becomes administrator all that he has done is made right, and all that his agent has done is made right also. To the same effect is *Hill v. Curtis*, L.R. 1 Eq. 90. The administrator may ratify what has been done, even without his authority, before he received letters of administration. The ratification relates back, and is equivalent to prior authority: *Foster v. Bates*, 12 M. & W. 226. That follows from the general doctrine of ratification. Because, if one enters as executor of his own wrong, and sells goods and then obtains administration, the sale is good by relation—the wrong is purged; so that when, for instance, a person sells a lease and afterwards obtains administration the title goes back by relation: *Kenrick v. Burges*, Moor. 126.

The person who seeks to justify by reason of a discharge from the right executor, must hand over the property or otherwise account to the rightful executor before action is brought against him: *Curtis v. Vernon*, 3 T.R. 587.

In *Hooper v. Summersett*, Wightw. 16, the wife was entitled to administer, and the husband, who was living in the testator's house with him previous to his death, carried on the business in the same way as in his lifetime. The wife proved the will *after* action brought. It was held that the probate did not relate back so as to abate the suit already begun. As is pointed out in *Hill v. Curtis*, L.R. 1 Eq. 100, if he had pleaded *plene administravit* he would not have been liable for more than the assets which he had received.

It has been settled in *Paull v. Simpson*, 9 Q.B. 365, that if one person possesses himself of the property of a testator and hands that property over to a second person, the latter is not an executor *de son tort*. But he may possibly be liable in equity. The rule in equity is the same as the rule at law, that if an executor *de son tort* can prove a settled account with the right-



ful representative before suit, it is a sufficient answer: *Hill v. Curtis*, L.R. 1 Eq. 90; *Merchants Bank v. Monteith*, 10 P.R. 467.

On the other hand a person cannot be made liable as executor *de son tort* here, because only of his having intermeddled with the goods of the testator in a foreign country: *Beovan v. Lord Hastings*, 2 Kay. & J. 724; *Jessup v. Simpson*, 14 U.C.R. 213. But if he has the assets within the jurisdiction of the Court he is liable: *Re Lovett*, 3 Ch. D. 98.

When the person charged with the possession of the testator's property has done the acts complained of under a colourable title to the goods of which he has possessed himself, even though he may fail to make out title in himself, he is not liable as executor *de son tort*: *Temings v. Jarrat*, 1 Esp. 355. But if the colourable title is a fraud on the creditors of the deceased and is defeated on that ground, the person claiming under such title is liable as executor *de son tort*: *Edwards v. Harben*, 2 Term. Rep. 587.

A person who deals with the goods as agent of an executor, though the will has not yet been proved, cannot be treated as executor *de son tort*. That arises from the authority possessed by executors before probate. They derive their title from the will, and they can do almost any acts incident to their office, and can commence actions before proving the will. It is clear that a person acting for an executor who has proved the will cannot be treated as executor *de son tort*, and several cases shew that the same is the case if he has not proved the will: *Sykes v. Sykes*, L.R. 5 C.P. 113; *Hall v. Elliott*, Peake 86.

But it may be quite otherwise if the executor does not prove the will before the person acting under his direction is sued as executor *de son tort*. In that case, the fact of the executorship is not a sufficient answer to the action.

An English company carried on business in the United States. One of the shareholders, a citizen of that country, died there, and probate was taken out by his executors in the United States, but not in England. The executors requested the company to trans-

fer certain shares and debentures to them in England, and to pay them certain dividends and interest, which the company did. It was held that by so doing without the production of probate or letters of administration in England, and with knowledge that the executors in the United States did not intend to obtain representation in England, the company had made themselves executors *de son tort*, because they had by so doing taken possession of and administered part of the testator's estate: *New York Breweries Company v. Attorney-General* (1899), A.C. 62.

It was contended in this case, and so decided by some of the Judges in the courts below, that in so doing the company "had simply done what the common law of England gives them the right to do, namely, to pay an executor without asking him for proof of his title by the production of the probate." But that was met in the judgment in appeal by saying that what was done was done with the full knowledge that the person whom they paid not only was not an executor, but had given distinct notice that he never intended to become an executor. As is pointed out in the same case in the Court of Appeal (1898), 1 Q.B., at p. 224, "there is a broad distinction between acts done by or under the direction of a mere intruder not named in the will, and acts done by or under the authority of a named executor. The latter taking title under the will is not a tort-feasor, neither is any one acting under him, and for certain purposes this may be material. But if the acts of the persons who have dealt with the assets are challenged, as they now are by the Crown, and their rights have to be ascertained in a court of law before probate is taken out, and a *fortiori* if it was never intended to be taken out—there is no material difference between the position of the intruder and his agents and the executor and his agents."

In accordance with the principles just stated, a person who acts under a power of attorney from one of the executors who has proved the will, is protected by the authorization of the execu-

tor, and cannot be made liable as executor *de son tort*; but if he continues so to act after the death of the executor has revoked his power of attorney, he may be charged as executor *de son tort*, notwithstanding that he acts under the advice of one of the executors who has not proved the will: *Cottle v. Aldrich*, 4 M. & S. 175.

The true criterion of the executor's own position is whether he has been appointed executor, and whether he has meddled with the estate. If he has, then he can be sued without more, and the person into whose hands money or other assets of the estate have come under his authority, may be liable as executor *de son tort*, and may be sued jointly with the executors: *Re Lovett*, 3 Ch. D. 198; *Ledge v. Traill*, 1 Russ. & My. 281n; *Cottle v. Aldrich*, *ante*.

Making the arrangements for the funeral of the testator, and collecting from the debtors of the deceased person sufficient money to meet the reasonable expenses of the funeral, is not such an intermeddling as will leave the person so doing liable as executor *de son tort*. The question for the jury to decide in such a case is whether the sums collected were, in view of the station and circumstances of the deceased, more than a reasonable amount for the purpose: *Camden v. Fletcher*, 4 M. & W. 378.

So, too, making an inventory of the property of the deceased, feeding his cattle, providing necessaries for his children or other similar offices of kindness and charity, will not suffice to make the person so doing executor *de son tort*.

The continued residence of the widow in the home of the deceased, the keeping open of the shop through which the house was reached, without selling any of the goods, the making of a valuation of his goods, and the giving of a promissory note for his debt, did not render the widow liable as executrix *de son tort*: *Searle v. Waterworth*, 4 M. & W. 9.

In order to prevent frauds by those entitled to administration 43 Elizabeth ch. 81 was passed. It is directed to rendering liable as executors of their own wrong all such persons as, being entitled

to administration, decline to act, but suffer or procure the administration to be granted to some stranger of mean estate, to the end that they may obtain a release of their debts or obtain the assets of the intestate from such administrator without payment of the debt or adequate consideration for the assets. The statute makes not only those who might have had administration, but every person obtaining a release of a debt, or receiving or obtaining the goods of the intestate, upon any fraud, or without such consideration as shall amount to the value of the goods or debts or thereabout, chargeable as executor of his own wrong. See R.S.O. ch. 337, sec. 8.

If the testator in his lifetime made a conveyance of his property in fraud of his creditors, and after his decease the grantee took possession of such goods and disposed of them, he thereby became executor of his own wrong: *Edwards v. Harben*, 2 T.R. 587.

The liability of a person as executor *de son tort* is a mixed question of law and fact. It is for the jury to say whether the acts charged have been proved, it is for the Judge to decide whether the acts proved make the person liable as executor *de son tort*: *Padget v. Priest*, 2 Term. Rep. 97; *Haacke v. Gordon*, 6 U.C.R. 424.

An executor *de son tort* has all the liabilities, without any of the rights, of an executor who has received probate of the testator's will: *Carmichael v. Carmichael*, 2 Phil. 101.

He is liable to the creditors of the deceased person to the extent of the assets which he has received, and it is not necessary to charge him expressly as executor *de son tort*, it is sufficient to set out the facts: *Re Lovett*, *Ambler v. Lindsay*, 3 Ch. D. 198.

He may also be sued by the executor or administrator whose right as personal representative is shewn by letters probate or letters of administration.

He may also be sued by a legatee.

It seems to have been open to doubt whether an action for



the administration of the estate of the deceased person could be brought against those executors who have intermeddled with the estate, and against those who, acting for them, have taken possession of the assets, though there has been no appointment of a legal personal representative. The decision was in the affirmative in *Re Lovett*, 3 Ch. D. 198; *Coole v. Whittington*, 16 Eq. 534; *Raynor v. Koehler*, 14 Eq. 262. The contrary was decided in *Rowse v. Morris*, 17 Eq. 20, and *Cary v. Hills*, 15 Eq. 79. See also *Outram v. Wyckoff*, 6 P.R. 150; *Re Colton*, 8 P.R. 542. In Ontario, Consol. Rule 196 has practically disposed of the question.

The executor *de son tort* of an executor is liable at common law in respect of the debts of the original testator: *Mayrick v. Anderson*, 14 Q.B. 719.

The liability of an executor or administrator of an executor *de son tort* is governed by statute.

The executors and administrators of any person who as executor in his own wrong, or as administrator, shall waste or convert any goods, chattels, estate or assets of any person deceased, to his own use, shall be liable and chargeable in the same manner as their intestate would have been if he had been living. 30 Car. II. ch. 7, sec. 1; R.S.O. ch. 337, sec. 16.

The liability is restricted to a *devastavit*. Previous to the passing of that statute there was no such liability even in the case of a *devastavit*: *Wilson v. Hodson*, L.R. 7 Ex. 84.

It is sufficient to sue the executor *de son tort* as executor or administratrix generally: *Raynor v. Koehler*, L.R. 14 Eq. 262. If there be a lawful executor he may also be joined in the same suit: *Re Lovett*, 3 Ch. D. 198; *Carmichael v. Carmichael*, 2 Ph. 101. But an administrator cannot be so joined.

The executor *de son tort* may relieve himself from liability by handing over to the rightful personal representative before action brought: *Hill v. Curtis*, L.R. 1 Eq. 90. But if he delay until after an action has been brought before he hands over the assets



to the rightful executor or administrator, he is then too late and his liability remains: *Curtis v. Vernon*, 3 Term. Rep. 587.

His liability is more restricted in one direction than that of the legal representative. He is liable only for such assets as have come to his hands: *Yardly v. Arnold*, 10 M. & W. 141; *Layfield v. Layfield*, 7 Sim. 172.

In an action by a creditor against an executor *de son tort*, if the latter plead *ne unques executor* and judgment is against the defendant, the plaintiff will recover his debt and costs to be paid out of the assets of the testator if the defendant have so much of them, and, if not, out of *his own* goods. By a plea of *plene administravit* which may be joined with a plea denying his executorship, he may by way of answer to the action shew that all the assets received by him have been duly administered. He may, for example, shew the payment of just debts of the deceased of an equal or superior degree to that of the plaintiff, and that such payments have exhausted the assets received by him: *Mountford v. Gibson*, 4 East. 454. He may even after action brought by a creditor under a simple contract, pay a specialty debt and plead the payment of that debt: *Oxenham v. Clapp*, 2 B. & Ad. 309. It would seem that he would be entitled to any payments which would have been allowed in due course of administration by the lawful executor: *McCarthy v. Donovan*, 13 Ir. Ch. R. 195. He cannot, under the plea of *plene administravit* or otherwise, escape liability by shewing that he has satisfied his own debt. If every creditor could take possession of goods of a deceased person sufficient to satisfy his debt, great strife and confusion would ensue: *Coulter's Case*, 5 Co. 30a. But if he obtain administration, even *pendente lite*, he is in the same position as the personal representative, for administration legalizes acts before wrongful: *Pyne v. Woolland*, 2 Ventr. 180.

Payments made to an executor *de son tort* form no defence to the person originally indebted, when sued by the rightful executors: *Thomson v. Harding*, 2 Ell. & Bl. 630; *Mountford v. Gibson*,

4 East. 453; *Allen v. Dundas*, 3 T.R. 125; *Hunter v. Wallace*, 13 U.C.R. 385.

The defence of *plene administravit* is no answer when pleaded by the executor *de son tort* in an action by the legal personal representatives, for taking possession of the goods or money of the deceased: *Elward v. Sandford*, 3 H. & C. 330. When the acts done or payments made are such as the rightful executor would have been obliged to perform or pay, in the course of administration, so that neither the estate nor the executor have been prejudiced, it would seem that such a defence may be set up in mitigation of damages only; but not as a justification of the unlawful acts, or payments: *Padget v. Priest*, 2 T.R. 100; *Mountford v. Gibson*, 4 East. 454; *Fyson v. Chambers*, 9 M. & W. 468; *Buckley v. Barber*, 6 Ex. 164. Even if the payments made amount to the full value of the goods sued for in trover or trespass, the lawful executor is still entitled to nominal damages: *Anon*, 12 Mod. 441.

It is generally said "that all lawful acts which an executor *de son tort* doth are good": *Coulter's Case*, 5 Co. 306. And in *Parker v. Kett*, 1 Ld. Raymond 661 it is said that a legal act done by an executor *de son tort* shall bind the rightful executor, and shall alter the property.

Payments or sales made by an executor *de son tort* are, however, subject to the limitation that to be good, as against the legal representative, they must be made by one acting, at the time, in the character of executor, apparently with authority to act as such, and must not be mere solitary acts of wrongdoing. Many acts, for instance payments or sales of property, which are sufficient to make the person doing them liable as executor *de son tort*, are not sufficient to make the payment or transfer of property good against the lawful executor: *Thomson v. Harding*, 2 El. & Bl. 630. In *Mountford v. Gibson*, 4 East. 411, the widow, who had not otherwise intermeddled and who did not assume to act in the character of executrix, handed back certain goods to a creditor from whom her husband had bought

them, in satisfaction of the debt owing for them. The administrator brought trover for the goods. The creditor set up the transaction with the executrix *de son tort* as a defence; but as she was not professing to act in the character of executrix, and he had no reason to suppose that she was executrix, the defence failed.

An executor *de son tort*, is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased, only when they are lawful, and such as the true representative was bound to perform in the due course of administration: *Graysbrook v. Fox*, Plowd. 275.

The executor *de son tort* cannot, by payments which he has made, prevent the running of the Statute of Limitations in favour of the rightful executor, even if the intermeddler himself be the one to take out probate after the lapse of years: *Webster v. Webster*, 10 Ves. 93; *Cook v. Dodds*, 6 O.L.R. 608; *Grant v. McDonald*, 8 Gr. 468. But such payments prevent the statute from taking effect in his favour, if sued as executor *de son tort*: *Cook v. Dodds*, 6 O.L.R. 608.

The wrongful acts of an executor *de son tort* to the prejudice of the estate are not made good by the subsequent grant of letters of administration to him: *Morgan v. Thomas*, 8 Ex. 302.

It is one of the consequences of intermeddling, that a person named as executor in the will cannot, after acts which render him liable as executor *de son tort*, renounce his right to probate. He may be cited and compelled to accept the duties of the executorship. For the authorities on this point, see the cases cited under Renunciation.

## CHAPTER XIV.

### PROBATE—ITS USE.

The probate of a will is a document in the prescribed form and under the seal of the proper Court in that behalf, which certifies that the will, a copy of which is thereunto annexed, was duly proved and registered in the Court, and that administration of the property of the testator was duly committed by the Court to the executors whose names and descriptions are therein set out.

It extends to all property within the province, whether real or personal and regardless of whether the deceased died within the province or was domiciled therein at the time of his death, except in the special case where probate has been limited to personal estate only, or is otherwise limited as to property in conformity with the limitations of the will. For it is competent for a testator to impose limitations on executors, or to appoint sets of executors; he may, for example, appoint executors for different portions of his property. He may appoint executors for properties situate in different counties: *Re Cohen* (1902), 1 Ch. 187.

The executor takes his authority, not from the probate, but from the will. The letters probate in the case of an executor, or the letters of administration in the case of an administrator, are the only evidence, recognizable by a Court, of his authority to deal with the property of the deceased: *Stump v. Bradley*, 15 Gr. 30. The probate, however, is not the foundation of the executor's title, but only the authentic evidence of it. The personal property vests in him from the moment of the testator's death.

“The case of executors differs essentially from that of administrators; executors receive all their power and interest from



the testator, and though before they can maintain an action they must prove the will, yet the probate is only the declaration of the proper Court that they are executors, which by the law of Scotland is called confirming the executors to the testator, and is the same in effect as is done here, and still the interest arises not from the probate, therefore an executor may release a debt or assign a term before probate, and if after probate he sues for the same, the precedent act done by him may be pleaded in bar. If an executor appoints another to be his executor, and dies, he is immediate representative to the first testator, but on the death of an administrator, his whole interest determines; and administration *de bonis non*, etc., must be granted": *Hudson v. Hudson*, 1 Atk. 461.

There is no succession by law to the personal property of a deceased person on the part of those who are entitled to it, whether under a will or by inheritance. Under The Devolution of Estates Act, R.S.O. 1897, ch. 127, real property devolves upon the legal personal representative of the deceased, whether he devise it, or die intestate; and apart from a conveyance from the legal personal representative, it does not vest in the devisee or heir until three years after the owner's death. Upon the expiration of that period, unless a caution is registered under the statute, there is a statutory transmission of the legal estate from the personal representative to the person beneficially entitled thereto.

What the Act has accomplished is to vest the real estate in the person who, as executor or administrator, is the deceased's legal personal representative, and to direct that it shall be administered as if it were personal estate subject to certain restrictions on the power to sell it: *Martin v. Magee*, 18 A.R. 388.

The right of succession to the personal estate, before administration was granted, formerly belonged to the ecclesiastical Ordinary in cases of intestacy or of the inability or refusal of the executor to act, and after the abolition of these Courts, to the judge of the Court having the grant of probate or administra-



tion. It would seem that in Ontario it vests in the Judge of the Surrogate Court, by whom it is delegated to the administrator by the grant of letters of administration.

As the effect of The Devolution of Estates Act, as stated in *Re Reddan*, 2 O.R. 781, is "to abolish the distinction between real and personal property for the purpose of administration, and to devolve the whole of the estate upon the personal representative," it is open to conjecture where the legal estate is vested in the interval between the death of the intestate owner and the appointment of a legal personal representative. The answer from analogy would seem to be that it is vested in the Judge of the Surrogate Court.

In England under The Land Transfer Act, 1897, the question in whom the legal estate vests in the interval between death and administration, has been regarded as somewhat doubtful, but it has been conjectured that, as the Act has made no provision on the subject, it will be held to vest in the heir-at-law: *Tristram & Coote's Probate Practice*, 13th ed., p. 8. If executors have been appointed who accept probate the legal estate vests in them.

In *Re Paneley and London and Provincial Bank* (1900), 1 Ch. 58, the testator had died in 1898 having appointed three executors and directed that if any of them should be absent from England at the time of his death, he should be at liberty to prove the will upon his return, and that all the powers and trusts thereby given to his trustees might be exercised by such of them as had proved. One of the executors, resident in India, neither proved the will nor renounced. The question was raised whether the two executors to whom probate had been granted could convey the legal estate upon a sale of land, or whether by the mere fact that three executors, none of whom had renounced, were named in the will, the legal estate was by the operation of the statute vested in all three. In the language of the Act, "Where real estate is vested in any person without the right in any other person to take by survivorship, it shall, on his death, notwithstanding any testa-

mentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them." The personal representatives hold as trustees for those beneficially entitled; and personal representative is defined by the Act as meaning an executor or administrator. Kekewich, J., in disposing of the question said: "It is common knowledge that an executor derives his title from the will, and not from the grant of probate, and that he can in his representative character do many things, including the transfer of chattels real, notwithstanding that he has not proved the will. According to the first section of the Act, real estate becomes on the death of a testator, and notwithstanding his testamentary disposition, vested in his personal representative, as if it were a chattel real vesting in them, and, having regard to what has just been said, there is, to my mind, insuperable difficulty in holding that it vests only in the executors who have proved to the exclusion of those who have not proved, unless, of course, the latter have, by renunciation or otherwise, made it impossible for them to obtain a grant of probate."

Where executors were appointed for a special purpose only, and other executors were appointed generally, the land devolved to and vested in the general executors to the exclusion of the special executors appointed only for a limited purpose: *In re Cohen's Executors and London County Council* (1902), 1 Ch. 187.

An executor who had renounced would not be a necessary party to a conveyance of land. His rights cease as if he had not been named in the will. See R.S.O. 1897, ch. 59, sec. 65, which re-enacts The English Court of Probate Act, 20 & 21 Vict. ch. 77, sec. 79.

The title of the executor being derived from the will, it follows that before he proves the will he may do many of the acts pertaining to his office.

The following passage from *Re Stevens* (1897), 1 Ch. 422, illustrates this: "I need only refer for this purpose to an

authority which cannot be disputed, namely, Williams on Executors, 9th ed., p. 249, where it is said: 'The executor, before he proves the will, may do almost all the acts which are incident to his office, except only some of those which relate to suits. Thus he may seize and take into his hands any of the testator's effects, and he may peaceably enter into the house of the heir for that purpose, and to take specialties and other securities for the debts due to the deceased. He may pay, or take releases of, debts owing from the estate; and he may receive or release debts which are owing to it; and distrain for rent due to the testator. . . . And although he should die, after any of these acts done, without proving the will, yet do these acts so done stand firm and good. . . . So, if an executor assents to a legacy, and dies before probate, yet the assent is good enough. So all payments made to him are good, and shall not be defeated, though he dies and never proves the will. In a word, the executor's not proving the will does, upon his death, determine the executorship, but not avoid it. It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to shew the right to make the assignment or give the assent; which can only be effected by producing the probate, or other evidence of the admission of the will in the Court. If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead.' The letters of administration *cum testamento annexo* would prove clearly who were named executors in the will, and the acts done by the executor who had not proved would shew his acceptance of the duties of executorship: See *Cummins v. Cummins*, 3 J. & Lat. 64. Therefore, at the time of which I am now speaking, the society might, if they had chosen, have paid the money (due on an insurance policy on the tes-

tator's life) to the executors and taken their receipt for it. . . Although the insurance company could safely have paid the executors before probate, the executors could not have compelled them to do so." But if one named as an executor in the will, acts in the character of executor about the estate, he cannot afterwards renounce, but must accept probate. If he does not apply for probate, and the will is proved by another he is, nevertheless, liable as an executor. *Ib.*

Any debtor of the testator is justified in refusing to pay his debt to the executor until probate is produced. All proceedings in an action by the executor to enforce such payment will be stayed until the plaintiff obtains probate: *Tarn v. Commercial Bank of Sydney*, 12 Q.B.D. 294; *Webb v. Adkins*, 14 C.B. 401. Similarly an action to recover possession of the testator's goods, or for damages for their wrongful conversion, brought by the executor, must fail unless he has proved the will. He must fail wherever it is necessary for him to prove title in himself as representing the late owner: *Hunt v. Stevens*, 3 Taunt. 113. It is otherwise where the executor has had *actual* possession, and such possession is, in the circumstances, sufficient to establish a cause of action. For example an action for money had and received was maintainable against a sheriff who seized and sold a pony, the property of the plaintiff's deceased husband, upon an execution against her lodger. Her possession of the pony at the time it was seized, would enable her to maintain trespass against a wrong-doer. She might waive the tort, and recover the money produced at the sale: *Oughton v. Seppings*, 1 B. & Ad. 241.

The grantee of the executor is in the same position as the executor as regards the goods of the deceased. For example, in trover for a horse and gig, which the plaintiff claimed by purchase from an executor to whom probate had not been granted at the time of the trial, and of which neither the executor nor the plaintiff ever had actual, exclusive possession, the plaintiff



failed to make out his title though the will itself was produced: *Pinney v. Pinney*, 8 B. & C. 335.

Though it is necessary that the will be proved before trial, yet before proof the executor in the eye of the law is considered as having some authority; for, even before probate, he may, so far act as to get in and receive his testator's estate, or release debts, or even bring actions for them, though *at the trial*, indeed, the law will oblige him to produce the probate: *Wills v. Rich*, 2 Atk. 285.

An executor may, pending the application for probate, bring an action to protect the testator's estate by injunction or otherwise, though the pleadings disclose that probate has not issued, and the absence of probate at the time the notice of motion for the injunction is given will be no bar, if it has issued before the motion is heard: *Newton v. Metropolitan Railway Company* (1861), 1 Dr. & Sm. 583.

An action cannot be maintained against one named in a will as executor unless he has either intermeddled with the estate so as to constitute himself executor *de son tort* or has obtained a grant of probate; and a sale made under an execution issued upon a judgment against such a person does not bind the deceased's estate: *Mohamidu Mohideen Hadjar v. Pitchey* (1894), A.C. 437. It is not sufficient to support such a judgment that the defendant has applied for probate, and taken the executor's oath of office; he may still renounce before probate is actually granted. The suggestion that an executor by applying for probate has conclusively accepted the trusts of the will does not seem to merit serious consideration: *Ib.*



## CHAPTER XV.

### THE PRODUCTION OF THE WILL AND CITATION OF EXECUTORS.

The executors appointed by the testamentary instruments entitled to probate have the right to prove the will and administer the estate thereunder if they are competent and are resident within the jurisdiction. If resident out of the jurisdiction, and the insolvency of the estate of the deceased or other special circumstances seems to make it necessary or convenient to do so in order to administer the estate, he may be passed over and administration may be granted to some person other than the person who would otherwise be entitled. Court of Probate Act (1857), Ch. 77, sec. 73; R.S.O. 1897, ch. 59, sec. 59; *Carr v. O'Rourke*, 3 O.L.R. 632.

The Court may compel the production and filing of the will to the end that the property of the testator may be administered.

The 26th section of The English Court of Probate Act, re-enacted in Ontario as section 26 of The Surrogate Courts Act, provides means for compelling the production of testamentary papers.

“The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shewn to be in the possession or under the control of such person; and if it be not shewn that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court, or upon

interrogatories respecting the same, and such person shall be bound to answer such questions or interrogatories and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default, and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court." See *Shepherd* (1891), P. 323, in which the executors and solicitor were ordered to bring in all wills and testamentary papers in their possession, on the application of persons who supposed they were beneficiaries, production otherwise having been refused.

The practice of the Surrogate Courts in Ontario by section 37 of The Surrogate Courts Act, 1897, so far as the circumstances admit, and the Ontario Statutes and Surrogate Court Rules do not otherwise provide, is according to the practice of the Probate Court in England, as it stood on the 5th day of December, 1859.

The examination mentioned above must be in open court or on interrogatories: *Laws*, 2 P. & D. 458, or in case of illness, before a commissioner: *Banfield v. Pickard*, 6 P.D. 33.

The procedure in Ontario is by order of the Judge of the proper Surrogate Court, under Surrogate Court Rule 21 and not by citation or subpœna as was the practice in England.

A solicitor, notwithstanding that he has a claim against the estate of the testator for unpaid costs, will be ordered to produce the will when it is in his custody. His lien upon his client's papers for costs, does not extend to the client's will after his death: *Georges v. Georges* (1811), 18 Ves. 294; *Balch v. Symes*, 1 Turn. 87; *Ex parte Law* (1834), 2 A. & E. 48.

The holder of a will directed to produce it, cannot dispute the jurisdiction of the Court, it seems, so to put the party seeking its production to the necessity of shewing residence or

property of the testator in the county: *Brown v. Coates*, 1 Add. 345.

The order may direct all testamentary papers in the custody of the person to whom it is directed, to be brought in: *Shepherd* (1891), P. 323.

If the will is in duplicate both parts must be brought in.

The testamentary papers having been discovered and filed in court, any person interested in the estate, whether as beneficiary or as creditor, may, upon a proper case being shewn, procure an order that all those having a prior right appear and accept probate or renounce the same. This order takes the place of a citation under the former practice.

A citation answers two purposes: It either compels a representation to be taken by those who are primarily entitled to it, or where they do not take it, the process provides a substitute for voluntary renunciation on their part.

It may be noted, too, that 21 Hen. VIII. ch. 5, sec. 6, confers jurisdiction on the Probate Judge or Surrogate Judge to cite before him any person named as executor of any will, to prove or refuse to prove such will and to bring in inventories and to do every other thing necessary or expedient concerning the same. See R.S.O. ch. 337, sec. 1.

Section 16 of The Court of Probate Act (Imp.), 1858, enacts that when an executor dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect to the executorship shall wholly cease, and the representation of the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. See R.S.O. ch. 337, sec. 2.

The order to appear and prove the testament, and take upon him the execution thereof or refuse the same may be issued by the Court either *ex officio*, or at the instance of any person who

discloses upon oath that he has an interest therein: *Wms. on Ex.* 10th ed., p. 228.

Before any citation can issue in respect of a will, the will must have been filed. The party citing must therefore have previously taken steps to get the will deposited in the proper office: *Tristram & Coote*, 13th ed., p. 232.

If proceedings are taken against a person who fails to bring in and file a testamentary paper, or to declare on oath his knowledge of any such paper, the application must, in the first instance, be upon notice to the person proceeded against. The practice of the High Court of Justice in regard to attachment is followed: *Baigent v. Baigent*, 1 P.D. 421; *Parkinson v. Thornton*, 37 L.J.P. & M. 3.

An executor who failed to obey a citation to accept or refuse probate under 21 Hen. VIII. ch. 5, sec. 6, was liable to ex-communication for a contempt, and is still punishable in England under the 25th section of The Court of Probate Act, 1857.

In Ontario, section 32 of The Surrogate Courts Act gives the Surrogate Court the same powers for enforcing its orders and punishing contempt as are vested in the County Courts.

The machinery being thus provided for the discovery, production and deposit of testamentary papers, and for causing the executors to accept probate and administer the property, or be deprived of all right thereto as completely as if they were not appointed executors by the will, the residuary legatee or devisee may obtain an order to compel the executor to accept or refuse probate, or to shew cause why letters of administration with the will annexed should not be granted to the person who obtains the order. So also a legatee or a creditor may cite the executor, the residuary legatees and the residuary devisees, if there are residuary bequests and devises, or the next of kin, if the residue has not been disposed of. The right of the creditor is not lost though his claim is barred by the Statute of Limitations: *Coombs*, 1 P. & D. 193. The right of action is barred, but the debt remains, and the administrator is entitled to retain it:



*Stahlschmidt v. Lett*, 1 Sm. & Giff. 415. In such circumstances the creditor would be required, before obtaining the grant, to give a bond to distribute the assets reliably with other creditors and without any preference of his own debt: *Coombe*, 1 P. & D. 288; *Elisha Peck*, 1 Sw. & Tr. 141.

It is optional with an executor whether he will accept or refuse probate, and he may finally renounce at any time before the grant has actually been made, even though he has taken the oath of office: *Mohamidu Mohideen Hadjiar v. Pitchey* (1894), A.C. 437.

The time within which an executor may accept or renounce is in the discretion of the Surrogate Judge before whom he is cited.

An executor who has intermeddled in the estate of his testator may be cited to take probate of the will, and, in case he refuses, may be compelled to do so by attachment. The attachment does not issue, in the first instance, for non-obedience to the citation. The proper course is, in the first instance, to issue a peremptory order upon the executor to take probate within ten days from the date of the order; and to pay the costs of the application: *Mordaunt v. Clarke*, 1 P. & D. 592.

In Ontario the grant of probate or letters of administration belongs to the Surrogate Court for the county in which the testator or intestate had at the time of his death his fixed place of abode.

If he had no fixed place of abode in, or resided out of Ontario at the time of his death, the grant may be made by the Surrogate Court for any county in which the testator or intestate had property at the time of his death.

In other cases the grant of probate or letters of administration belongs to the Surrogate Court of any county: R.S.O. 1897, ch. 59, sec. 19.

If the testator or intestate had no fixed place of abode in, or resided out of, Ontario, at the time of his death, notice of the intended application must be given by advertisement in three successive issues of the Ontario Gazette. Sec. 39.



## CHAPTER XVI.

### PROBATE IN COMMON FORM.

Proceedings under The Surrogate Courts Act and the rules made thereunder are either contentious or non-contentious.

In Ontario a proceeding is adjudged contentious when an appearance has been entered by any person in opposition to the party proceeding, or when a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding, or when an application for grant is made on motion and the right to such grant is opposed, or when application is made to revoke a grant, or when there is contention as to the right to obtain probate or administration, and before contest terminated: Rule 1. The practice as to appearance, and for the conduct of contentious business after appearance is the same, as nearly as may be, as the practice in the High Court of Justice: Rule 2.

Non-contentious business, as defined by the rules, includes all common form business, as defined by The Surrogate Courts Act, and the warning of caveats.

"Common form business" shall mean the business of obtaining probate or administration where there is no contention as to the right thereto, including the passing of probates and administration through a Surrogate Court when the contest is terminated, and all business of a non-contentious nature to be taken in a Surrogate Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration. R.S.O. 1897, ch. 59, sec. 2, sub-sec. 4; R.S.M. 1902, ch. 41, sec. 2 (*d*). This definition is taken from The Court of Probate Act (Imp.), 1857, "Surrogate Court" being substituted for "Court of Probate." R.S.B.C. ch. 73 gives substantially the same definition.

Wills may be proved either in common form or in solemn form. In common form the grant is based on evidence set out by affidavit. In solemn form the evidence is taken in open court, and all parties interested are usually cited to appear.

We have seen in previous chapters, that the unrevoked or duly revived testamentary instruments of a competent testator, properly executed, without coercion, fraud or undue influence, made with knowledge and approval, on the part of the testator, of its contents, are entitled to probate.

The application may be made by a solicitor or by the applicant in person. Solicitors are the only persons allowed to act on behalf of others in the Surrogate Court. See Rule 2.

No probate will be issued until after seven days from the death of the testator except by direction of the Judge. Rule 3, and see also Rule 64.

The usual practice in ordinary cases is to file all the necessary documents with the proper law stamps affixed, in the office of the Registrar of the Surrogate Court of the county in which the deceased person had his fixed place of abode at the time of his death.

The Surrogate Registrar then transmits to the Surrogate clerk by letter a notice of the application, containing the name, description, additions and late abode of the testator, the time of his death, the name of the person applying, and such other information as the Rules may from time to time prescribe. The Surrogate clerk makes a search in the records of his office and forwards a certificate to the Registrar, upon the lapse of seven days after the death in the case of probate, or fourteen, if administration is sought. This certificate shews whether or not application for probate or administration in respect of the property of the same deceased person has been made in any other Surrogate Court, or whether any appointment has been made by the High Court. R.S.O. 1897, ch. 59, sec. 47.

Unless upon special order or judgment of the Court no pro-

bate or administration will be granted without this certificate. Section 45.

In case it appears by the certificate of the Surrogate clerk that application for probate or administration has been made in two or more Surrogate Courts, the Judges of these courts stay all proceedings therein, and a Judge of the High Court upon application to him inquires into, and determines in a summary way, what Surrogate Court has jurisdiction. His adjudication is final, and the Surrogate clerk transmits a certified copy of it to the Registrars of all the Surrogate Courts concerned. The High Court Judge has also jurisdiction over the costs of such proceedings. Sections 48-51.

When applications for representation to the estate of a deceased person who had no fixed place of abode in Ontario and left property in several counties therein, are made in more than one Surrogate Court, preference will be given to that made by the person nearest in the order in which administration is usually granted; the application of a mother will be preferred to that of the brothers or creditors: *Re Tougher*, 3 O.L.R. 144.

The proper certificate having been received from the Surrogate clerk under section 45 that no other application appears to have been made in respect of the property of the same deceased person, or upon the termination of the contest under sections 48-51 of the Act, the Registrar attends the Surrogate Judge in his chambers, without the attendance of the applicant or his solicitor being required, submits to him the will and other necessary documents and proofs, and if everything is regular and proper the Judge directs probate to issue.

The documents which are required to be filed, in an ordinary case, with the Registrar of a Surrogate Court are as follows:—

1. *The petition of the executors.*

Every application to a Surrogate Court for grant of probate or administration must be by petition prepared, signed and presented by the applicant or his solicitor. The petition must itself

shew the value of the whole property of the deceased, and the separate value of the personal and real estate. An itemized appraisement of both, verified by oath, must accompany the application: Rule 5.

The necessary affidavits to lead grant and the executors' oath may either be filed with the petition, or at any time afterwards before the Registrar submits the application to the Judge: Rule 8. If there should appear to be any material variation between the facts stated in the petition and the facts disclosed by the affidavits, the Judge may direct the petition to be amended, and he may also direct a new notice to be sent to the Surrogate clerk: Rule 9. This might be necessary, for example, if the petition gave the date of the testator's death in a later year than the fact was.

2. *The renunciation of all executors who do not join in the petition and have not been excluded by their failure to accept probate in answer to a citation.*

Renunciation is the act whereby a person who has a superior interest or right to probate or administration waives and abandons it. It must be absolute and without reserve, and takes effect from the day of its date: *Munday v. Slaughter*, 2 Curt. 72.

It is permanent and no second renunciation is required, and it is not necessary to cite the person who has renounced: *Harrison v. Harrison*, 1 Rob. 406.

The right of an executor, or person entitled to administration, to renounce is well settled: *Doyle v. Blake*, 2 Sch. & Lef. 239. The right may be exercised at any time before the actual passing of the grant, though the petition has been filed, and the oath of office as executor or administrator has been sworn: *Mohamidu Mohideen Hadjar v. Pitchey* (1894), A.C. 437.

No liability in connection with the estate of the testator attaches to an executor who has renounced probate without having intermeddled with the estate; and an action against him



for the testator's liabilities will be dismissed with costs: *Stinson v. Stinson*, 2 Gr. 508; *Vanallo v. Mitchell*, 15 Gr. 665.

The 79th section of The English Court of Probate Act, 1857, which is section 65 of The Ontario Surrogate Courts Act, provides that whenever "any person renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor."

A renunciation of probate operates as though the name of the executor were thereby expunged from the will: *Noddings*, 2 Sw. & Tr. 15. Even when the will confers a power on "my executors hereinafter named," it must be determined from the language of the will whether the power was given to them as three named individuals or whether it is annexed to their office. "In the former case, the power can only be exercised by all the persons named; in the latter, it can be exercised by those who actually take probate and by them only": *Crawford v. Forshaw* (1891), 2 Ch. 261.

The Court has power to permit an executor who has filed a renunciation of his rights, to retract such renunciation, notwithstanding the terms of section 79 of The Imperial Probate Act, 1857; but he certainly will not be permitted to do so, unless he can shew that such retraction is for the benefit of the estate or of those interested under the will: *Gill*, 3 P. & D. 113; *Badenach*, 3 Sw. & Tr. 466. The same principle was affirmed in *Stiles* (1898), P. 12, in which it was decided that in a proper case, where the circumstances have altered, one of several executors who had renounced, may be allowed to retract his renunciation, and carry on the executorship. It would seem that when all the executors have renounced, and administration with the will annexed has been granted, the renunciation could



not be retracted, for the obvious reason that the representation had been suffered to go into another channel. The executor who had taken probate had absconded, and the executor who had renounced was allowed to retract his renunciation and take probate. In *Wheelwright*, 3 P.D. 71, the sole executrix having renounced, and the administrator with the will annexed having died, administration was granted to the sole executrix who was also universal legatee, in the latter capacity but not in the former.

A renunciation which has been taken into the proper office, but not acted upon therein may be withdrawn, and probate granted to the renouncing executor: *Morant*, 3 P. & D. 151. So that, as one may renounce at any time before the grant is made, he may also withdraw that renunciation before it is acted upon by the making of the grant.

The provisions of section 79 of The Court of Probate Act, 1857, do not apply to renunciations made before it came into force.

In *House v. Lord Petre*, 1 Salk. 311, the common law rule in force prior to the statute is thus stated: "Where there are several executors, and one renounces before the Ordinary, and the rest prove the will, by the common law he who renounced may at any time afterwards come in and administer, and, though he never act during the life of his companions, may come in and take on him the execution of the will after their death; and shall be preferred before any executors of his companions." Can. S.U.C. ch. 16, sec. 1, which enacted section 79 of The English Act, made the renunciation peremptory: *Allen v. Parke*, 17 U.C.C.P. 105.

An executor who renounces probate thereby forfeits any bequest given to him in that character; and the presumption is that a legacy given to a person appointed executor is given to him in that character; and it is on him to shew something in the nature of the legacy, or other circumstances arising in the will,

to repel that presumption: *Stockpole v. Howell*, 13 Vesey. 420; *Jervis v. Lawrence*, L.R. 3 Eq. 345; *Paton v. Hickson*, 25 Gr. 102.

An executor who has intermeddled with the estate of his testator, cannot subsequently renounce; the Court has no power to permit him to do so. If an executor has rendered himself liable by acting in the affairs of the estate, and the Court not knowing it, grants administration to another, such administration may be revoked, and the executor compelled to prove the will: *Mordaunt v. Clarke*, 1 P. & D. 592; *Re Stevens* (1897), 1 Ch. 422. In *Badenock*, 3 Sw. & Tr. 465, a renunciation was held invalid after intermeddling, and the executor was allowed to retract it on that ground.

Proof should, therefore, be given that an executor who renounces has not intermeddled with the estate of the testator.

A renunciation, accompanied by the original will, may be filed at any time after the death of the testator: *Fenton*, 3 Add. 35.

The executor must either renounce, or be cited, before administration with the will annexed will be granted to the residuary legatee. The consent of the executor is not sufficient: *Garrard v. Garrard*, 2 P. & D. 238.

Under the English Rule 50 (1862), a renunciation by a person as executor is a waiver of his rights in other capacities as well, as, for instance, as residuary legatee.

This rule has been construed to mean that where a man under a will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground: *Russell*, 1 P. & D. 634.

Consequently an executor could not renounce, and take administration as residuary legatee, next of kin or creditor.

Nor could the residuary legatee or next of kin take administration as a creditor.

But an executor may say that he will have nothing to do with the property as executor, renounce probate in his own

right, and afterwards take administration with the will annexed as attorney of other executors who are out of the jurisdiction: *Russell, ante*.

The renunciation of executorship of his own testator's will operates as a renunciation of the wills of which the testator was executor, and breaks the chain of representation. The representatives of an executor are bound by his renunciation: *Perry*, 2 Curt. 655.

In Ontario the forms annexed to the Rules contemplate that renunciation shall be under seal. Forms 27 and 28. Under 21 Hen. VIII. ch. 4, sec. 1, now R.S.O. 1897, ch. 337, sec. 12, a written renunciation not under seal, made before and produced from the office of the Surrogate is sufficient to enable the other executors to convey under a power given them in the will to sell the real property. *Doe v. McGill*, 8 U.C.R. 224.

It may be made under a power of attorney to that effect: *Rosses*, 3 Sw. & Tr. 492.

Infants and minors may renounce by their guardians; and retraction, when it can be made, is made in the same way: *West v. Willby*, 3 Phillim. 374. A mother has been appointed guardian to renounce in behalf of a child *en ventre sa mere*. See R.S.O. ch. 168.

We have already seen that the failure to enter an appearance to a citation has the same effect as a renunciation.

Where all the next of kin have renounced in order that a stranger might take, and his application was afterwards refused, the Court permitted one of them to retract: *Blake*, 14 W.R. 1021.

Somewhat greater latitude is allowed in permitting retraction of administration than of probate; upon the death of the original administrator, who was of inferior degree, those of superior degree may retract their renunciation and take administration *de bonis non*: *Skeffington v. White*, 1 Hagg. 702.

But administration will be granted to the retracting party only in the same limited form as it was originally granted in.

Thus, upon the death of a creditor who was appointed administrator during the lunacy of the widow, the next of kin who had renounced, was allowed to retract, and was granted administration limited in the same way: *Penny*, 1 Rob. 426.

Non appearance to a citation, upon the death of the administrator then appointed, does not require a retraction. The party refusing in that way may come in and take a grant *de bonis non*, but he is subject to precisely the same rules as govern a retraction, and has no more privileges than the person who renounced in form: *Trist. & Coote*, 13th ed., p. 230.

### 3. *The executor's oath.*

This must be in writing sworn to by each of the executors, as an affidavit: Rule 12.

All may join in one affidavit. In fact all the proofs to lead grant may be embodied in one affidavit: Rule 8.

Rule 38 provides that when there are several deponents the names of each must appear in the jurat.

Every will or copy of a will to which an executor or administrator with the will annexed is sworn, shall be marked by such executor or administrator and by the person before whom it is sworn. The will is marked by the signature of the executor or administrator written thereon, either at the foot of the last page if there is room, or on the back of the will. It should not be marked on a sheet on which no part of the will is written, though the sheet is annexed to the will.

The English Rule 47 (1862) directs that, in non-contentious business, "the usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry."

In Ontario Rule 12 also directs that "the usual oath of administration is to be reduced to writing, and to be subscribed and sworn to by the executors or administrators as an affidavit."

The form provided under the English Rule as the usual oath



of administration requires the exact day of the testator's death to be deposed to. The form prescribed in Ontario requires the executor to swear, not that the testator died "on" the specified day, but "on or about" the date named.

The form of the executor's oath, so far as it relates to the death of the testator, where the Court gives leave to presume death from continued absence for a long period or from shipwreck or similar calamity, is discussed later in connection with the affidavit of death. It is not made until leave has been given, upon motion, to presume the death, and recites the order to which it is made to conform.

The variations in the form of the oath when the probate is limited, are indicated in the forms.

#### 4. *The affidavit of the testator's death and place of abode.*

Since the testament is of no effect so long as the testator liveth, in addition to the statement contained in the oath of each of the executors as to the fact of the death of the testator "on or about" the date named, a formal affidavit is usually made by some person having actual personal knowledge of the fact of the death, which sets out as well the time and place when and where the death occurred, as the place where, at the time of his death, the testator had his fixed place of abode. The knowledge which the executor has as to the testator's death, may well in many cases be derived from information received from others. The witness who speaks directly as to the death, should speak only from personal knowledge.

Where, however, there is no certain knowledge regarding the death of the testator resort must be had to the presumptions of law.

At common law it may be presumed that a man is dead at the expiration of seven years from the time he was last known to be living: *Doe d. Knight v. Nepeau*, 5 B. & Ad. 96, 2 M. & W. 893; *Elizabeth Haw*, 1 Sw. & Tr. 7. But there is no legal presumption as to the date of his death: *Ib.*; *Alston* (1892),



P. 142; *Nicholls*, 2 P. & D. 461. It is necessary for the person who asserts the death of the absent person of whom nothing has been heard, at an earlier time than the end of the seven years, to affirmatively establish it by evidence: *Doe d. Hagerman v. Strong*, 8 U.C.R. 291. There is no presumption of the death until the end of the seven years; those who assert death earlier must prove it: *Re Benham's Trusts*, L.R. 4 Eq. 416; *Re Phine's Trusts*, L.R. 5 Ch. A. 139.

The circumstances of the disappearance may be such as to raise the presumption of death after a much shorter time than seven years. In less than two years after a ship on which the testator sailed was last spoken with before her final disappearance on a voyage from Liverpool to Peru, an application for administration was granted. Nothing had been heard of the vessel or any of her passengers afterwards, and the underwriters had paid as upon a total loss: *Alston*, [1892] P. 142.

In *Matthews*, [1898] P. 17, the testator, an old man, disappeared suddenly from his home without any assignable cause, and was not afterwards heard of. He was living on the rents of his houses, and was in comfortable circumstances. After his disappearance, searches had been made in the neighbourhood without result, advertisements had been published in five newspapers, the registers of deaths searched, the police and other officials had made investigations. On affidavits establishing these facts the Court gave leave to presume his death. See also *Norris*, 1 Sw. & Tr. 7.

In *Saul*, [1896] which was a case of the total disappearance at sea of a ship on which the testator was mate, leave was given on April 20th, 1896, to make an affidavit that the testator had died on or since March 31st, 1895, that being the last date on which the ship was heard of.

The time before which a person died may be presumed from circumstances, even within the period of seven years.

In the case of *In re Henderson's Trusts*, cited in *In re Beasney's Trusts*, L.R. 7 Eq. 498, the Master of the Rolls came to the

conclusion that the fact that the person presumed to be dead had not applied for a half-yearly payment of an annuity for which he had hitherto regularly applied, and on which he chiefly depended for his maintenance, was sufficient to lead to the presumption that he died before such payment became due. In the last mentioned case Wm. Beasney was of drunken habits and in such ill-health when last seen, in August, 1860, that his death might have been expected at any time. He failed to apply for his October dividend in 1860, and nothing was ever heard of him after August, 1860. In 1869 he was presumed to have died before November, 1860.

Where positive proof of the testator's death cannot be given, the applicant for probate must lay the facts before the Court and verify them fully by affidavit. If the facts deposed to shew a reasonable presumption of the death of the person who has disappeared, the Court will give permission to the applicant to swear that the person died on or since the date of his disappearance, and will grant probate or administration as the case may be.

Advertisements, asking for information concerning the person supposed to be dead, are, as a general rule required to be inserted in newspapers published in places where such information is most likely to be obtained, especially if the death of the person is presumed from his not having been heard of for a long time: *Robertson*, [1896] P. 8. If, however, the deceased is presumed to have perished in a ship which was lost at sea, the advertisement may be dispensed with by the Court: *Norris*, 1 Sw. & Tr. 7.

On an application for leave to swear that a person was dead, who had emigrated to Australia and for some years after corresponded regularly with his relatives, but who had not been heard of for twenty-five years past, the Court ordered advertisements inquiring for information about him to be published in newspapers: *Robertson*, [1896] P. 8.

In *Clarke* (1896), P. 287, on an application by the next

of kin for leave to depose to the death of a person who left England for Australia in 1865, and corresponded with his relatives in England until 1877, but had not since been heard of, the affidavits shewed that advertisements asking for information concerning him had been published in England and Australia in 1895; but letters referred to in the affidavit of the applicant were not produced and there were no affidavits of other persons corroborative of his belief that the testator was dead. The application was enlarged for further and better material.

Where the estate of the person whose death the Court was asked to presume consisted in part of a policy of assurance on his life, the Court ordered that notice should be given to the insurance company of the application for leave to swear to the death as having occurred in or since the month of October, 1877, the date of the last letter received from him. Advertisements had been inserted in the principal newspapers in Victoria and New South Wales, where he was last known to have been. In ordering notice to be given to the insurance company the Court said: "In these cases we are asked to proceed very much in the dark, and I think that before any order is made we ought to take every step which appears to be likely to throw light on them. Those who are interested in shewing that the man is alive ought certainly to have the opportunity of doing so if they can. You must give notice to the insurance company, but subject to that, the death may be presumed as having occurred in or since October, 1877": *Barber*, 11 P. & D. 78.

In *Saul*, [1896] P. 151, on a motion for a grant of probate and leave to make an affidavit that the testator had died on or since March 31st, 1895, after which date the ship on which he was sailing as mate had not been heard of, it appeared that a letter had been received from an insurance company with whom the deceased had insured his life, stating that they did not intend to interfere in respect to either application. The letter was ordered to be filed, and the motion was then granted.

Notice of the intended application should be given to all

persons who have an interest opposed to the presumption of death. Those who are interested in shewing that the man is alive ought certainly to have the opportunity of doing so if they can: *Barber*, 11 P.D. 78.

If the death of a person is to be presumed from the lapse of seven years without his having been heard of, the next of kin should be notified of the application.

The affidavit referred to is the oath of the executor or administrator, varied to suit the circumstances by inserting a recital of the order by which leave to depose to the death is given, and stating that the testator died on or since the date when he was last heard of.

It is not usual to give leave to presume the death of some person other than the one whose estate is to be administered. In *Clarke*, 15 P.D. 10, the wife, or widow, died intestate in 1889. Her husband had gone to South America in 1870, and had not been heard of after 1873. The wife's next of kin claimed administration of her estate, on the contention that she died a widow. The Court refused to assume that she was a widow, or to presume that the husband was dead seven years after he was last heard of.

In *Nicholls*, 2 P. & D. 461, it was stated that the mode in which this Court and the Courts of Equity deal with such a state of things, is to say that those whose claim is founded on the survivorship of either must prove it affirmatively. Thus, if the next of kin of the husband claim administration to the wife on the ground that he survived, they must produce evidence of the fact, and, conversely, if the next of kin of the wife claim the grant, they must shew that she survived. The wife's next of kin having failed to shew that she died a widow, the Court ordered the usual practice to be followed, and directed the husband or his representatives to be cited.

In *Reed*, 29 L.T. (N.S.) 932, the applicant for administration was the mother of the intestate. His father had disappeared twenty-two years before. She was allowed to take the grant on



the filing of her affidavit that she believed herself to be the sole next of kin, apparently without citation or advertisement.

This case was followed in *Callicott*, [1899] P. 190. The intestate in that case died in 1898. His son would, if alive have been entitled to administer, but he had married and left the country in 1872, and had not been heard of since. A son of the intestate's deceased daughter was allowed to take a grant of administration without requiring the missing next of kin to be cited by advertisements, on his filing an affidavit that he believed himself to be the sole next of kin. See also *Shoosnuth*, [1894] P. 23.

When the High Court of Justice has decided in favour of the presumption of death, and has adjudged payment of trust funds to the next of kin, on establishing the facts of the case and the order of the High Court, the Surrogate Court will dispense with the advertisements, and grant administration to the next of kin: *Main*, 1 Sw. & Tr. 11.

In seeking to prove the death of the person whose estate is to be administered, it is often of importance, as determining the succession, and the right to administration, to shew which of two persons is the survivor. This question arises when one of them has disappeared and has not been heard of for upwards of seven years, but with the presumptions in that case we have already dealt. It also arises when the two persons have perished in the one calamity, such as a shipwreck, a fire, a railway collision or an earthquake, and there is no direct evidence of survivorship.

The law in regard to presumptions arising out of such circumstances was discussed in the House of Lords in *Wing v. Angrove*, 8 H.L.C. 183, and the following principles were established.

There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.



Nor is there any presumption of law that they all died at the same time. The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The burden of proof is on the person who asserts survivorship. There may be presumptive evidence which satisfies the mind of the Judge as to which was the survivor. For example, in *Sillick v. Booth*, 6 Jur. 142, from the evidence it appeared that one brother was an older, more robust and experienced mariner than the other, and it was concluded from these facts that he was the survivor.

The person who would be entitled by survivorship, either to property or to the right to administer the estate of one of the deceased persons, must, if he be an applicant, establish his right by proof of the fact.

In *Re Benjamin*, [1902] 1 Ch. 723, a son, who had been a defaulter, disappeared, in 1892. His father, under whose will the son would have taken a bequest of £30,000, if he were the survivor, died in 1893, nearly a year after the son's disappearance. The father had, in his lifetime, made good the defalcations of the son. Letters of administration had been granted to the son's estate, leave having been obtained from the Probate Division to swear to his death on or since the date of his disappearance. The executors of the father's will made an application to the Court, upon originating summons, for directions as to the disposition to be made of the son's share in his father's estate. The master reported that he was unable to certify whether the son was living or dead, or if dead, when he died. The Court held that he must be presumed to be dead; and if so, the onus of proof is on his administrator to shew that he survived the testator. The executors were authorized to distribute his share on the presumption that he predeceased his father; but to protect his rights in case he returned, it was not declared that he was dead. The order stated that in the absence of any evidence that the son survived the testator, the trustees should be at liberty

to divide the share bequeathed to the son upon the footing that the son was unmarried and did not survive the testator. This decision was followed in *Re Walker*, L.R. 7 Ch. 120, in which the principle was laid down that it rested upon those claiming under a beneficiary named in a will to shew that he survived the testator, and upon their failure to do so, the share would be distributed as if he had died in the testator's lifetime.

In *Scatterthwaite v. Powell*, 1 Curt. 596, it is said that the principle has been frequently acted upon, that where a party dies possessed of property, the right to that property passes to his next of kin, unless it be shewn to have passed to another by survivorship. Here the next of kin of the husband claim the property which was vested in the wife. If that claim was made out, it must be shewn that the husband survived. The property remains where it is found to be vested, unless there be evidence to shew that it has been divested. The husband and wife having perished from the same cause, there was nothing to shew that the husband outlived his wife, and administration was granted to her next of kin.

In the case of *Robert Murray*, 1 Curt. 596, the man, his wife and child, were drowned at sea, and nothing was known beyond these facts. Administration with the will of the husband annexed, was granted to his next of kin, there being nothing to shew that the wife survived.

The rule is stated in Williams on Executors thus: "The next of kin has, subject to the rights of the heir at law in cases coming within the operation of The Land Transfer Act, 1897, a *primâ facie* right, and therefore where a party claims as, or derivatively from, a residuary legatee or residuary devisee in cases coming within The Land Transfer Act, 1897, the burthen of proof lies on such party. Hence, when the husband appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship, the Court granted administration to the next of kin of the husband, on the ground that the

next of kin of the wife had not proved her survivorship." P. 373 of the 10th ed.

In *Wing v. Angrove*, 8 H.L.C. 183, *ante*, the wife had made her will under a power of appointment, in favour of her husband, and in case he should die in her lifetime, to the appellant Wing. The husband's will gave his property to his wife, and, in case she died before him, to the appellant Wing, in trust for the children on coming of age, in case none of them lived to come of age, then to the appellant absolutely. The husband and Wing were named executors of the wife's will; the wife and Wing were executrix and executor of the husband's will. The husband, wife and all their children were lost at sea from the same ship.

In order to take under the husband's will it was necessary for Wing to shew that the wife died before the husband; which he failed to do. To entitle him to take under the appointment contained in the wife's will, it was necessary for him to shew that she survived her husband. There being no presumption and no evidence as to survivorship, he failed to take under either will, and his position was not improved by his being residuary legatee under both wills. In discussing the husband's will, Lord Cranworth put it in this way: "The real ground to proceed upon is, that it cannot be proved which died first. They both probably died within a few seconds of each other, but which died first it is impossible to say. That being so, what is the result? Why, here is a will made in which, in one state of circumstances, namely, that if the wife died in the husband's lifetime, the property is given away. It is not proved that that state of circumstances existed, and in no other state of circumstances is it given away. Then it is not given away at all. Therefore it must be taken as upon an intestacy, and must be distributed amongst the next of kin": *Underwand v. Wing*, 19 Beav. 459.

This case was followed in *Alston*, [1892] P. 142, where the husband and wife had each made a will in favour of the other as universal legatee and sole executor, and substituting

executors in case of the other dying first. They were both lost at sea on the same ship, with all on board. A grant of administration with the will annexed was made in each case as upon an intestacy, the administration of the husband's estate being given to his next of kin, and of the wife's estate to her next of kin.

The affidavit of death also sets out the place of abode of the testator at the time of his death. Proof of this is necessary for several reasons. The law of the testator's domicile governs the validity of his will as a testamentary disposition, and also determines its construction. If his domicile is abroad, it may be necessary to shew that under its law his will is duly executed.

Under sections 38-40 of The Surrogate Courts Act (Ont.) the affidavit as to the place of abode and the situation of the property of the deceased, conclusively determines the jurisdiction of the Surrogate Court making the grant, provided that such affidavit discloses facts which, assuming them to be incontrovertible, would entitle the Court of that county to make the grant.

Section 19 of The Surrogate Courts Act enacts that: "The grant of probate or letters of administration shall belong to the Surrogate Court for the county in which the testator or intestate had at the time of his death his fixed place of abode.

If the testator or intestate had no fixed place of abode in, or resided out of, Ontario at the time of his death, the grant may be made by the Surrogate Court for any county in which the testator had property at the time of his death.

In other cases the grant of probate or letters of administration shall belong to the Surrogate Court of any county.

For instance, it may be necessary to take out administration in a case where the intestate died *in itinere*, without having any property within the province or leaving property in any county of less value than £5. The value of the goods which, owned by the deceased in two or more dioceses, were to be accounted *bona notabilia*, and so as to found the jurisdiction of the Prerogative



Court, which embraced many dioceses, and to oust the jurisdiction of the Consistorial Court, which was limited to its own dioceses. See *Middleton v. Crofts*, 2 Atk., at p. 659; *Graysbrook v. Fox*, Plowd. 277; *Grant v. Great Western Ry. Co.*, 7 U.C.C.P. 438.

The conflicts of authority which occasionally arose between different courts are now only of historic interest. Statutory provision has been made for a speedy determination of such questions if they arise. See section 48 of The Surrogate Courts Act, and *Re Taugher*, 3 O.L.R. 144. In that case it was decided that if application for letters of administration to the estate of a deceased person, domiciled abroad at the time of his death, is made to more than one Surrogate Court, preference will be given to the applicant who has the prior right to administration by reason of the order of relationship of the several applicants.

If the affidavit discloses that the testator or intestate whose estate is to be administered, had no fixed place of abode within Ontario at the time of his death, or resided out of the province at that time, the affidavit of the applicant or of one of the applicants must disclose the fact, and the further fact either that he left property, real or personal, within the county, or that he left no property real or personal in Ontario. It must further be shewn that notice of the intended application has been published in at least three successive issues of the *Ontario Gazette* in addition to the other proofs ordinarily required.

5. *The will itself and codicils if any.*

The will must be produced and deposited in the Registry, with the various affidavits annexed to it. It should be marked by the executors, and by the commissioner or other official before whom they are sworn. Some of the Surrogate Judges also require the will to be marked by the witnesses to the execution of the will, and by the person who makes the affidavit of plight.

6. *The affidavit of execution of the will.*

The form of this affidavit will depend upon whether the will



to be proved was executed before the first day of January, 1874, or since that date.

We have already seen what the law was in Ontario in reference to the execution of wills before 1874, and have considered the requirements for valid execution since that date. The corresponding date in England is the first day of January, 1838, when The Wills Act came into force.

Numerous questions of importance and difficulty arise in reference to the proof of execution.

In a simple case the affidavit of one of the attesting witnesses which sets out fully and clearly the facts requisite for valid execution, is sufficient if in the form prescribed by the Rules.

In England under the Rules made under The Court of Probate Act, 1857, the oath of the executor identifying the last will is sufficient, if there is a proper attestation clause setting out all the requisites of a valid execution. But if there is no attestation clause, or an insufficient one, an affidavit from at least one of the attesting witnesses is required, if they or either of them be living, to prove that all the provisions of The Wills Act, 1 Vict. ch. 26, sec. 9, and 15 Vict. ch. 24, in reference to the execution have been in fact complied with: Rule 4. The Wills Act expressly provides that no form of attestation shall be necessary.

In Ontario, by Surrogate Court Rule 10, it is provided that, "The due execution of the will or codicil shall be proved by one of the witnesses, or the absence of the witnesses accounted for; in which last case such will or codicil must be established by other proof, to the satisfaction of the Judge." So that in no case can the executor establish the will on his own oath as executor. If he be one of the witnesses to the will he must make the usual affidavit of execution in the form subjoined to the Rules.

In some instances when one witness cannot recollect the circumstances or when his evidence, if accepted, would suggest that the will was not duly executed, the affidavit of the second witness is essential.

It has not seldom happened that the Court, from a consideration of all the circumstances, comes to a conclusion at variance with the statements of the witnesses when these statements are inconsistent with the inferences which may fairly be drawn from the facts. This is especially so in the case of illiterate witnesses, or after the lapse of a considerable time.

In *Cooper v. Beckett*, 4 Moo. P.C. 419, one of the two witnesses to the execution stated that the will was signed by the testator *after* the witnesses had signed. The other witness saw him write something after her husband and she had signed, but was unable to say what it was, but she thought that the space where the testator's name was written was blank when she signed. All of the circumstances were carefully examined; it was deemed improbable and contrary to the usual notions or habits of men of the world or well educated or well informed persons, whether professional or unprofessional, to have a document which requires a party's signature attested or subscribed by a witness before its signature by the party, and for the party to sign afterwards. Then it seemed that some part of the signature of the witness was written over, and therefore later than, a line, which, if his recollection was correct, was put there after the witness had signed. Attention was called to the difficulty of recalling, after the lapse of some months, the exact particulars and order of a set of circumstances in which the witness has no personal interest. The will was upheld as validity executed, the Court being satisfied that the witness was mistaken as to the order of the signatures.

In *Lloyd v. Roberts*, 12 Moo. P.C. 158, the testator was an attorney. The will in question was in his own handwriting, without break or crowding, with an attestation clause in its proper place, and it was properly signed by two witnesses. The grant of probate was opposed on the allegation that the paper was wholly blank at the time of its execution, and that the testator wrote his will upon it, after he and the witnesses had signed. One witness was dead. The other deposed that, when

he signed, the paper was, with the exception of the signatures of the testator and of the other witness, blank paper. The will was admitted to probate. In accordance with the maxim "*Omnia præsumuntur solemniter esse acta*," it must be presumed that the will was properly executed, that presumption is strengthened by the fact that the testator was a solicitor in considerable practice, and must have known the law. The statement that nothing was written but the two signatures before the witness signed, was treated as "a most extravagant supposition" and contrary to the appearance of the will. The conclusion reached by the Court was that the witness was utterly mistaken in his recollection.

In *Wright v. Sanderson*, 9 P.D. 149, neither of the witnesses could say what writing was on the paper when they signed, or whether the testator's signature was there, and both said they did not see him sign. The testator had written a holograph codicil, which was the document in question, on the same paper as his will, from which he adopted the attestation clause on the codicil. The language used in *Blake v. Knight*, 3 Curt., at p. 561, was cited with approval. "No doubt the memory of the witnesses fails them with reference to circumstances happening nearly four years ago. The Court cannot safely trust to the memory of witnesses under such circumstances; it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the will when the the witnesses signed it; whether it was signed in their presence, or signed beforehand and acknowledged in their presence." There was no suspicion of fraud in the case, and no reason to question the integrity of the witnesses. The conclusion the Court came to, from a careful consideration of the circumstances, was that the testator signed in the presence of these two witnesses, and that they had forgotten what had taken place.

In *Burgoyne v. Showler*, 1 Rob. 12, the principle on which the Court proceeds is stated to be that in the absence of sufficient

recollection on the part of the witnesses, the will should be presumed to be duly executed.

The presumption *omnia rite esse acta* is applied where all the formalities of signature and attestation are regular. The Court will be very careful not to defeat the intention of the testator by setting aside the will unless the evidence clearly rebuts the presumption: *Smith v. Smith*, 1 P. & D. at p. 145; *Wright v. Sanderson*, 9 P.D. 149; *Doe v. Davis*, 9 Q.B. 648.

The presumption is not confined to wills with a proper attestation clause. It extends to all wills. The maxim, "*Omnia præsumuntur rite esse acta*," is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such a probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted when such observance is proved, nor has it any place when such observance is disproved. The maxim only comes into operation when there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect: *Harris v. Knight*, 15 P.D., at p. 179.

In *Trott v. Skidmore*, 2 Sw. & Tr. 12, there was no attestation clause, and the witnesses were dead. On proof of the handwriting of witnesses and testator, the maxim was applied and probate granted.

In *Jane Thomas*, 1 Sw. & Tr. 255, two of the three witnesses were dead, the third whose name was written above the names of the other two, had no recollection of any other persons being present with the testatrix when he signed as witness. There



was no attestation clause. The recollection of the surviving witness was evidently faulty. The maxim was applied and probate granted.

In *Burgoyne v. Showler*, 1 Rob. 5, the presumption was applied to the execution of a will with a defective attestation clause. Both of the witnesses remembered signing as witnesses in the presence of the testator, but one of them did not recollect being present with the other when the testator signed.

In *Wright v. Rogers*, 1 P. & D. 678, there was an attestation clause signed by two persons; and, while one of these witnesses said it was duly executed, the other, after the death of the first witness, stated that it was not witnessed in the testator's presence. The Court disbelieved him, and declared the will valid.

Fry, L.J., in *Wright v. Sanderson*, 9 P.D., at p. 163, thus states the principle on which the Court will proceed to decree a will valid, though the evidence of the attesting witnesses falls short of establishing it or even seems, in some measure, if taken literally, to disprove it. "The codicil propounded is *ex facie* perfectly regular as regards all the formalities of signature and attestation. The presumption *omnia rite esse acta*, therefore applies to the codicil."

"But the conduct of the testator, both in the preparation of the codicil and in the calling together of his witnesses, shews an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption.

"That presumption is not, in my opinion, rebutted by the evidence of the two witnesses who think that the testator did not sign in their presence, for these witnesses were somewhat nervous and flurried on the occasion, and are accordingly confused and forgetful in the witness-box. They were witnesses about whose honesty the learned President of the Probate Division entertained no doubt, but on whom he, who saw and heard them, felt that he could not rely to rebut the presumption which arises from the admitted facts of the case." . . .  
"The Judges who have presided over the Court of Probate have



long been accustomed to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred.”

The Court must be satisfied from the facts deposed to, so far as they are believed, and from the surrounding circumstances, that the will was duly executed. If the witnesses state facts which demonstrate that the will was not duly executed, and there are no circumstances on which the Court can found an inference that the recollection of the witnesses is mistaken or infirm, the will must be rejected though all the signatures are genuine, and the attestation clause in proper form.

In *Wilson*, 1 P. & D. 269, the inference drawn from the position of the signatures of the persons said to be witnesses, and from the signature of one person who signed beneath the word witness, was that the alleged witnesses signed, not to attest the signature of the testator, but to indicate their acceptance of the trust contained in the document, and probate was refused.

In *Sharman*, 1 P. & D. 661, the name of one of the three who were apparently witnesses to the executor of the will, was omitted from the probate on its being shewn that he had not signed in the capacity of witness.

In *Swinford*, 1 P. & D. 630, the Court in the circumstances refused to presume the regularity of the execution of the document, it not appearing by direct evidence that the signature of the testator was on the document at the time the witnesses signed, though there was an attestation clause.

In *Blake v. Blake*, 7 P.D. 102, the requisites for a valid acknowledgment are fully considered. The witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator. It is not sufficient that the signature be actually there, or that the testator say that the paper to be attested in his will, or that his signature is inside the paper, unless the witnesses either actually see, or have the opportunity of seeing the signature. There was a regular attes-

tation clause, but the evidence disclosed that the witnesses had no opportunity of seeing the signature of the testator, and their evidence was consistent with all the circumstances.

Every will so far as regards the position of the signature of the testator, or of the person signing for him, shall be deemed valid, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. It is further enacted that the will shall not be affected by the circumstance that the signature does not follow, or is not immediately after, the foot or end of the will, or that a blank space intervenes between the concluding word of the will and the signature, or that the signature is placed among the words of the testimonium clause, or of the attestation clause, or follows, or is after, or under the clause of attestation, either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or is on a side or page or portion of the will whereon no clause or paragraph or disposing part of the will is written above the signature, or that there shall appear to be sufficient space on or at the bottom of the preceding page or other portion of the same paper to contain the signature; and the enumeration of these circumstances shall not restrict the generality of the enactment; but no signature shall be operative to give effect to any disposition or direction which is underneath, or which follows it.

In pursuance of this statute a signature written crossways on the second page of a paper, on the first and third pages of which the will was written, was held sufficient: *Powell*, 4 Sw. & Tr. 34; *Coombs*, 1 P. & D. 302. A signature, one letter of which was on the last line of the will, and the remainder of which was written across the last line but one, is at the foot or end: *Woolley*, 3 Sw. & Tr. 429. So, too, when a will made in France had the signature beneath a notarial minute on the same sheet: *Page v. Donovan*, Dea. & Sw. 278.

In *Williams*, 1 P. & D. 4, the will was made on a folded sheet of foolscap, the disposing part of it ended about the middle of the second page. The testimonium clause commenced below a blank space about a third of the way down the third page, and the testator's signature was beneath it, and just opposite the middle of the concluding paragraph of the will on the second page, and it was held that the signature complied with the Act because it was opposite the concluding words of the will. The will was also held to be validly executed when signed opposite to the concluding sentence which was in three short lines not extending across the paper: *Ainsworth*, 2 P. & D. 151. The signature may be on a piece of paper attached by a string to the bottom of the parchment on which the will is written: *Gausden*, 2 Sw. & Tr. 362; *Horsford*, 3 P. & D. 211. Or in the attestation clause: *Huckvale*, 1 P. & D. 375. Or beneath the signatures of the witnesses: *Puddephat*, 2 P. & D. 97. Or across the first and fourth pages of a sheet of note paper on the second and third pages of which the will was previously written: *Archer*, 2 P. & D. 252. Or at the top of the fourth page, the will itself ending in the middle of the third page: *Hunt v. Hunt*, 1 P. & D. 209; *Hammond*, 3 Sw. & Tr. 90. But a duly attested signature on each of the earlier pages is not sufficient where an unattested signature appears on the last page: *Dilkes*, 3 P. & D. 164; *Phipps v. Hale*, 3 P. & D. 166. Nor is a mark made in the middle of a testamentary paper by one who is paralyzed, as it is not at the foot or end of the will: *Margary v. Robinson*, 12 P.D. 8. Nor a signature and attestation at the end of the first page, so far as the second and third pages were concerned, though it is effective as to the first page: *Rayle v. Harris* (1895), P. 163. Such a signature was, in that case, held to be, not a signature of authentication as in *Phipps v. Hale* and *Margery v. Robinson*, *ante*, but a signature of execution. Nor is a clause valid which is written after the testator has signed, but in the presence of, and before signing by, the

witnesses, though it be opposite the testator's signature: *Arthur*, 2 P. & D. 273.

In *Hughes*, 4 Sw. & Tr. 410, his will having been previously executed on the first page of a sheet of foolscap, the testator had a codicil written by a neighbour on the third page of the sheet. This codicil began "the following alterations having first been made," and ended with an attestation clause in proper form; but the codicil was not executed at the end. The mark of the testator and the signatures of the attesting witnesses were made on the first page in the margin of the will, under the impression that as the codicil made alterations in the will, it should be executed in the margin. The Court refused to admit the codicil to probate, because it was not properly executed.

In *Fuller* (1892), P. 377, the whole of the disposing portion of the will was written on the first side of a sheet of foolscap; the second and third sides were blank; and the attestation clause with the signature of the testator and the witnesses was on the fourth side. Probate was granted.

In *Anstee* (1893), P. 283, the signature of the testator and of the attesting witnesses was at the bottom of the first page of the will. A sentence unfinished on that page was concluded on the second page. The first page was admitted to probate, and the second page rejected.

It is not sufficient that the name of the testator, written by his own hand, appears in his will at the beginning or in some other part, if he has not signed it at "the foot or end thereof." But if his signature is contained in an attestation clause written by himself, and there are grounds for inferring that it was there when the witnesses signed, that is a compliance with the Act: *Huckvale*, 1 P. & D. 375, citing *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Pearn*, 1 P.D. 70.

If the will has been lost or mislaid since the testator's death, secondary evidence may be given of its contents. If a copy of it has been made, or if the draft from which it was engrossed



is in existence, probate may be taken of such draft or copy, limited until the original be brought into Court.

Proof must be produced by affidavit that the original will was duly executed, that it was in existence after the testator's death, that it has been lost, and that the copy or draft is a true copy or draft.

In some circumstances a direction may be given to advertise for the lost will. This affidavit and the result of it will be proved by affidavit.

It is a general rule that when a lost or destroyed will is sought to be established, the Court will require it to be established in solemn form before admitting it to probate; but in a simple case where satisfactory evidence was given of the contents of a destroyed will, of its due execution, of its existence at the time of the testator's death, and of its subsequent destruction by a thief without the slightest fault or negligence on the part of those whose duty it was to take charge of it, the Court upon the consent of those who would benefit by an intestacy, granted probate of a draft of the will *on motion*: *Barber*, 1 P. & D. 267.

In *Pearson*, [1896] P. 289, Gorrell Barnes, J., said that after looking through the cases and making inquiries in the registry he could not discover a single case in which the contents of a lost will had been allowed to be proved on motion without the consent of the next of kin. He reached the conclusion that it was the practice to always require such consent, and where it was not given, to require the will to be prepounded. He intimated that if the estate had been small he might have disposed of the question on motion, but as the estate was £1,100 or £1,200 he refused to do so.

But the same Judge in *Apted*, [1899] P. 273, indicated that he was prepared to modify the view he expressed in the last case. He said that in clear cases, without specifying what those cases may be, these applications may be acceded to and be granted administration with the will, as contained in the copy,



annexed until the original will should be found. In this case the personal estate was about £5 and the real estate under £200.

Where an original will has been lost or destroyed, after the testator's death, or has been destroyed in his lifetime either accidentally by himself without intention to revoke, or by some other person, but not in the presence of the testator and by his direction, and there is no copy or draft of the will, probate of the substance of the will or of so much of it as can be proved, may be granted if it can be proved by oral evidence. The evidence of one trustworthy witness, even though interested, may be sufficient for that purpose. The leading case on the proof of lost wills is *Sugden v. Lord St. Leonards*, 1 P.D. 154, 252.

In that case the testator was a very eminent lawyer, Judge and author, who was assisted by his daughter as his amanuensis in the preparation of his works and who also was aided by her in his testamentary arrangements.

The pleadings in the action set out the contents of the will in "substance or effect." The due execution of the will was proved by several witnesses. The only witness who was able to give evidence of the contents of the will was the daughter of the testator. Just after her father's death and the discovery of the loss of the will, she wrote down from memory without referring to the codicils a complete statement, and subsequent reference to the codicils corroborated the correctness of her recollection of the contents of the will. She was also corroborated by statements made by the testator, both before and after the execution of the will, as to its contents. It was decided that statements made by him after the execution of the will were admissible to prove its contents. The integrity and competency of the one witness were beyond dispute, and probate was granted of the contents of the last will as set out in the pleadings of the plaintiffs. The case also decided that where the contents of a lost will are not completely proved, probate will be granted to the extent that they are proved. The generality of the statement is subject to qualification, owing to later decisions.

In *Woodward v. Goulstone*, 11 A.C. 469, two questions that came up in *Sugden v. Lord St. Leonards* were discussed in the House of Lords.

It was greatly doubted in the judgments in the higher court whether probate ought to be granted of the residuary bequest only of a lost will, unless the Court is satisfied that it has before it substantially the testamentary intention of the testator. The proof in the earlier case did satisfy the Court that it had before it the substance of the testator's intention, and no doubt was meant to be cast in the later case on the soundness of that decision.

The validity of the execution of a lost will must be shewn with as much strictness as in any other case.

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming after his death the presumption is that it was destroyed by himself. To rebut it there must be sufficient evidence that it was not destroyed *animo revocandi* by the testator: *Allan v. Morrison* (1900), A.C. 604. The presumption will be more or less strong according to the character of the custody which the testator had over the will: *Sugden v. Lord St. Leonards*, 1 P.D. 154.

The question of the admissibility of the declarations of the testator, made after the execution of his will, was also discussed; but the whole question was, so far as the House of Lords is concerned, left open for decision in some future case. It was evident, however, that some, at least, of their Lordships greatly doubted the soundness of the decision.

Lord Herschell says: "I think that an order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before me substantially the testamentary intentions of the testator."

In *Atkinson v. Morris* (1897), P. 40, the Court of Appeal decided that the declarations of a testator made after the execution of the alleged will are not admissible to prove its execution,

and they are equally inadmissible to prove that it was executed in duplicate. Where, therefore, evidence of oral statements of the testatrix to the effect that her will was made in duplicate and that she had revoked it by destroying one part was tendered, it was rejected. The decision in *Sugden v. Lord St. Leonards* was not to be extended to apply to declarations other than as to the contents of the lost will.

As we have seen it is only in clear cases, and when the amount of the estate is small, that probate of a lost will is granted upon motion. As a general rule, such wills must be proved in solemn form. After the contest is over and the will established the proceedings are continued as in all ordinary cases, with such variations in the executor's oath as meet the circumstances.

Sometimes the Court has granted probate of scripts, filed in the action, at other times of the deposition of a witness or an extract from such deposition, as containing the substance or effect or contents of a lost will. In *Sugden v. Lord St. Leonards* probate was granted of the part of the plaintiff's pleading which set out the will.

The grant of probate in such case is limited until the lost will or codicil as the case may be, or a more authentic copy is brought in.

The probate to a codicil was granted, limited until the lost will, to which it was a codicil, was found, in a case where it was thought by the Court that the codicil was intended to operate separately from the will and independently of it: *Greig*, 1 P. & D. 73.

In some instances no will is found after the testator's death, and it is quite uncertain whether there is a will in existence or not. The persons entitled to administration may be unable to swear that they believe the testator died intestate, as they may have reason to suspect or believe that the testator left a will which they are unable to discover. The Court will then grant administration limited until the original will or a copy be brought in.

It is necessary to the validity of a will that the testator should have knowledge of its contents and approve of its terms. Occasionally it happens that in seeking probate it is necessary to correct a clerical error, which it is clearly evident is not the expression of the testator's intention. For example, in *Bushell*, 13 P.D. 7, the testator in the draft of his will which after being read over to him was executed he made a bequest to the Bristol Royal Infirmary. The engrossing clerk inadvertently substituted "British" for "Bristol," and the will was executed by the testator without its having been read over either to or by him. The affidavits disclosed that the testator's intention was to benefit the Bristol Royal Infirmary. Upon motion the Court granted probate of the will with "Bristol" substituted for "British," subject to the filing of an affidavit that there was no such institution as the "British" Royal Infirmary.

In *Morell v. Morell*, 7 P.D. 68, the testator, in the instructions for his will, directed that all his shares of certain stock should be given to his nephews, but the word "forty" was inserted several times in the will before the word "shares." As a matter of fact the testator owned not forty shares, but four hundred. The jury found that the word "forty" was inserted inadvertently and by mistake, that the clauses in which it occurred were not read over to the testator, and that his approval of the will was only upon the supposition that it bequeathed all his shares to his nephews. The Court upon these findings ordered the word "forty" to be struck out wherever it occurred.

In *Fulton v. Andrews*, L.R. 7 H.L. 40, the Court of Probate directed certain issues of fact to be tried by a jury at the assizes. The jury found that at the time of the execution of the will the testator did not know and approve of the residuary clause thereof. The House of Lords remitted the cause back to the Court of Probate to revoke probate of the whole will, and to issue probate of the will omitting the residuary clause.

In *Thomas Cooper*, [1899] P. 193, one of the executors named in the will was "the said Thomas Cooper." There was



no such person named before in the will, and the testator had no relative or friend of that name; but his friend, Thomas Stevenson, was named earlier in the will as a trustee along with two other persons who were properly named as executors. The Court ordered the word "Cooper" to be struck out of the probate, and granted probate to Thomas Stevenson, "in the will described as Thomas ———," and the other two executors, but refused to insert "Stevenson" where "Cooper" was struck out.

In *De Rosaz*, 2 P.D. 66, the Court was called upon to construe the appointment of an executor described as "Percival ———, of Brighton, Esquire, the father." The engrossing clerk was unable to decipher the name in the draft. Later the will was executed without the blank being filled, or the will being completely read over to the testator before execution. Evidence of the surrounding circumstances was admitted to shew who was described by the words used. There was only one person to whom the designation was applicable. It would seem that the Court thought that if there were several persons within the designation, parol evidence of the testator's intention would have been admissible.

A clause revoking all former wills, when inserted by a mistake of the draftsman in a testamentary paper which was only designed to be supplementary and auxiliary to an existing will, was omitted from the probate in *Oswald*, 3 P. & D. 162. It appeared that the revocation was introduced *per incuriam* and without instructions, and that the testamentary paper had been executed on the supposition that it conformed to the instructions, without its being read to or by the testator. The earlier will and the later testamentary paper were admitted to probate with the revocation clause omitted.

In *Collins v. Elstone* (1893), P. 1, the revocation clause, inadvertently inserted, was read by the testatrix, and was by her allowed to remain, under the mistaken advice that it would not affect the earlier will. The motion to omit the clause was



refused, as the testatrix, knowing of the contents of the will, must be taken to approve thereof.

The principle by which the Court will be guided in determining whether an error in a will is such as to enable the Courts to correct it and issue probate in conformity with the testator's intentions, was discussed in *Harter v. Harter*, 3 P. & D. 11. The testator had given certain instructions for the disposition to be made by will of the residue of his estate. The draft will, which was left with the testator, and the will as executed inserted the word "real" before "estate," so as to limit the disposition intended to real property only, though the testator had intended it to apply to personal property too. The draft will was left with the testator, and was considered by him. The Court will expunge words or clauses inserted by mistake or fraud which were not intended by the testator to be there, and of the presence of which he had no knowledge. But it will not modify the language used by the draftsman and adopted by the testator, to make it express the supposed or actual intention of the testator, if by some misapprehension the language which was actually used with the testator's knowledge, does not express his purpose.

In *Guardhouse v. Blackburn*, 1 P. & D. 109, it was established to the satisfaction of the Court that specific words had been inserted by the attorney who prepared the document, by mistake, and without instructions. But, as the contents of the testamentary writing had been brought to the knowledge of a competent testatrix, the execution of the instrument was deemed conclusive evidence that she approved or knew the contents.

See also *Rhodes v. Rhodes*, 7 A.C. 192. It was there said that when a portion of a will was introduced through fraud or perhaps inadvertence, it may be rejected, and probate granted of the remainder if they are severable, but when the omission of the rejected words alters the sense of the remainder it is questionable whether the document is a valid will.

There is no difference between the words which a testator himself uses in drawing up his will and the words which are

*bonâ fide* used by one whom he trusts to draw it up for him. See also *Duane*, 2 Sw. & Tr. 590; *Gordan* (1892), P. 228; *Moore* (1892), P. 378.

In *Honeywood*, 2 P. & D. 751, the Court refused to order the omission from the probate and the books of the registry, of a paragraph of a will on the ground that, as was alleged, it made a false charge against a person named in the will, and was offensive to his feelings.

The position of the signatures of the attesting witnesses, unlike the position of the testator's signature, is not prescribed by The Wills Act. If they sign upon the document with the intention of attesting the testator's signature, the place where they sign is not of any importance. "Subscribed" in The Wills Act does not mean "written underneath," but "written upon the will," and it does not matter where the witnesses signed, as long as the Court was satisfied they signed meaning to attest the will: *Roberts v. Phillips*, 4 E. & B. 450. In *Streatley*, [1891] P. 172, the witnesses signed in the margin of the first and second sheets opposite certain alterations, but with the intention of attesting the signature of the testator at the end of the will. The will was upheld. See also *Griffiths v. Griffiths*, 2 P. & D. 300.

In *Braddock*, 1 P.D. 433, the witnesses signed their names on the back of the will to attest the execution of a codicil which was attached to the will by a pin. It was decided that the attestation, if not on the same sheet as the signature of the testator, must be on a paper physically connected with that sheet, and pinning is a sufficient means of connection.

Where the will is executed by a marksman, or by a blind or obviously illiterate person, the affidavit of execution must shew that the will was read over to the testator, and that he appeared perfectly to understand the same. The Court must be satisfied that the testator knew and approved of the contents of the will: *Edwards v. Fincham*, 4 Moo. P.C. 198. See Chapter V.

### 7. *Affidavit of plight.*

The ordinary affidavit of execution of a will, when the testamentary paper is free from alterations, interlineations and obliterations, is sufficient evidence to establish its validity.

The practice in Ontario varies somewhat in different counties. Some Surrogate Judges require an affidavit of plight only when something in the condition or contents of the will requires to be accounted for. Other Judges insist upon an affidavit of plight as a part of the proofs to lead grant in every instance.

If, however, there are alterations, additions or erasures, these require to be specifically accounted for. The presumption, in the absence of proof, is that they were made after the testator executed. Evidence may shew that they were made before execution. The person in whose handwriting the will is, may be able to state positively that he made the alterations, or whatever they may be, before the testator signed; or one of the witnesses may have noticed them and remembered their presence.

If these changes have been duly executed in the margin by the signature or initials of the testator and the witnesses, in the same manner as the will is executed, then it is immaterial so far as concerns their validity, whether they were made before or after the execution of the will. But the evidence, in case they are made after the will is executed, should shew that the signature or initials of the testator verifying the change were written or acknowledged in the presence of both witnesses present together, and that both witnesses signed in the presence of the testator.

The attestation clause may contain such a reference to the alterations, interlineations or erasures as to prove their own execution.

The English Rules (1862) relating to the proof required are as follows:—

“8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode

required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

“9. When interlineations or alterations appear in the will (unless duly executed or recited in or otherwise identified by the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

“10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be readily ascertained, they must form part of the probate.

“In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.”

These rules give formal expression to the law since The Wills Act in regard to the proof of alterations, interlineations, erasures, etc., in testamentary documents. They give practical directions for carrying into effect section 21 of that Act, which enacts that “No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alterations as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the



margin or on some other part of the will opposite or near to such alteration, as at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

This section is number 23 in The Wills Act of Ontario.

The sufficiency of the initials of the testator and the witnesses as proof of the due execution of alterations, or even of the will itself, has been upheld in a number of cases: *Blewett*, 5 P. & D. 116; *Baker v. Denning*, 8 Ad. & E. 94; *Hindmarsh v. Charlton*, 8 H.L.C., at p. 167; *Christian's Case*, 2 Rob. 110. If merely placed to attest the alteration, they will not serve as an attestation of the will itself: *Martin*, 1 Rob. 712.

In the absence of recollection by the witnesses to the execution, or of initials, the presumption that alterations, interlineations and erasures have been made after execution is rebutted by a declaration of the testator made before the execution of the will, that he meant to make provisions consistent only with the changed provisions of the will: *Dench v. Dench*, 2 P.D. 60; *Doe v. Palmer*, 15 Q.B. 747. In *Dench v. Dench*, ante, the Court decided not to act on evidence of declarations subsequent to the execution. See *Sugden v. Lord St. Leonards*, 1 P.D. 154, and *Woodward v. Goulstone*, 11 A.C. 469.

The effect of alterations, interlineations and omissions and the proof requisite to verify them have been already considered.

It may be noted, however, that all verified alterations are not in all circumstances admitted to probate. Thus, in *Hall*, 2 P. & D. 256, the testator some time after the execution of his will, struck out with a pencil several paragraphs of the will, and made his initials in the margin; he also wrote the word "query" opposite other paragraphs. Subsequent to these alterations and queries he made a codicil, which altered the will in certain respects and confirmed it in all others. The alterations made in pencil in the will were construed as deliberative only and not as final, and the alterations were consequently disregarded in granting probate.



A will made in England before 1838, or in Ontario before 1874 is governed by different principles. Unattested alterations in such a will, in the handwriting of the testator will, in the absence of a date, be presumed to have been made before the Act, and so entitled to probate without specific proof: *Streaker*, 4 Sw. & Tr. 194.

The same principle is applied to military wills and wills of seamen: *Tweeddale*, 3 P. & D. 204.

If the alterations have been made by some other person than the testator, other considerations apply.

It must then be shewn by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time that it was found in the repositories of the testator recently after his death, may, under circumstances, suffice.

8. *The affidavit of value of the property devolving.*

9. *The inventory and valuation of the real property.*

10. *The inventory and valuation of the personal property.*

These are sufficiently explained by the forms themselves. They may be made by any person who is so familiar with the affairs of the testator as to be able to enumerate and value his assets.

In case the testator had no fixed place of abode in Ontario or resided out of Ontario, the application for probate or administration must be advertised in the Ontario Gazette as required by section 39 of the Surrogate Courts Act, for at least three successive issues. In cases within that section there must be added

11. *Proof of advertisement in the Ontario Gazette.*

12. *The affidavit of value and relationship, in duplicate, and its schedules, also in duplicate.*

These are now required by the rules made under the Succession Duty Act with all applications for probate or administration.

In addition to the papers brought into the Registry by or on behalf of the applicant for the grant of probate or administration, the Registrar adds thereto

(a) The certificate of the Surrogate Clerk that no similar application is pending.

(b) The memorandum of fees payable to the Crown, the Judge and the Registrar.

(c) The list of papers certified by the Registrar to the Judge.

(d) The Judge's order for the grant.

The following directions are usually observed in practice.

As a general rule the signature of a testator is to be adopted as his name, although it differ from the name written in the heading of the will.

In case of a variation between the name of the testator in the heading of the will, and the name signed at the foot or end of it, if the former is the more correct of the two, the testator should be described by the name signed, the word "otherwise" followed by the name given to him in the will being added.

If the testator's name is wrongly spelt in the will, and the will is signed by his initials or by a mark, he would be described by his correct name, the word "otherwise" followed by the name written in the will being added.

If the testator is described in the will as the "elder" but has not so subscribed, such description is not to be inserted.

If the testator is described in the will as the "younger" but does not so subscribe, he should, notwithstanding, be described as the "younger" or "heretofore the younger", as the case may be.

The testator's place of residence, stated in the will or codicil, must form part of his description, and any previous or subsequent residence may be added, providing that not more than three places of residence be inserted.

When there is one executor or executrix only named in the will, he or she should be described as the "sole executor," or the "sole executrix."

When there are more executors than one, if they are all females, they are to be described as "the executrixes." If they are all males, or partly males and partly females, they are to be described as "the executors."

If the name of an executor or executrix is misspelt in the will, the words "in the will written" should be added to his or her correct name, and if the two names be identical in sound, no proof of identity is required.

If an executor be wrongly described in the will as "the elder" or "the younger," or by a wrong christian name, an affidavit is required in proof of identity of the person intended, whether he be the executor applying for the grant, or an executor to whom power is to be reserved.

Whenever it appears by the will that an executor or executrix is related to the testator as father, mother, grandfather, grandmother, son, daughter, grandson, granddaughter, brother, sister, uncle, aunt, great uncle, great aunt, nephew, niece, great nephew, great niece, he or she is to be so described.

Occasionally even greater particularity is used. If a testator describe an executor as "his nephew A., son of his brother B.," that executor must designate himself such in the oath.

Persons applying for administration are to be described in the oath as follows:—

A husband as "the lawful husband."

A wife as "the lawful widow and relict."

A father as "the natural and lawful father and next of kin."

A mother as "the natural and lawful mother and only next of kin."

A child as "the natural and lawful child, and only next of kin." or "the natural and lawful child, and one of the next of kin."

A brother as "the natural and lawful brother."

A sister as "the natural and lawful sister."

If there be no parents living, the brother or sister is further to be described as "one of the next of kin" or the "only next of kin."

An uncle as "the lawful uncle," and "one of the" or "only next of kin."

An aunt as "the lawful aunt," and "one of the" or "only next of kin."

A nephew as "the lawful nephew," and "one of the" or "only next of kin."

A niece as "the lawful niece" and "one of the" or "only next of kin."

A grandparent, grandchild, cousin, etc., is to be described as "lawful" and "one of the next of kin," or "only next of kin."

An heir-at-law as "the heir-at-law."

This particularity of description is not used in all cases, though the grantee be as near in kindred as any of those before designated, e.g., an executor being the testator's great grandfather is not required to be so described in the oath. Persons further removed in relationship than those just mentioned, e.g., cousins of any degree, are also not to be so described.

A nephew or niece could be described as the natural and lawful child of A.B., the natural and lawful brother or sister of the intestate, who died in his lifetime, and as such, one of the persons entitled in distribution.

The practitioner must be careful to insert the true place of residence (even if only temporary), of every deponent to the "oath" or affidavits. A club will not suffice, unless it be the actual residence.

Where there is more than one codicil, mention the number in the "oath".

If the executor (or rather, the person claiming to be the *persona designata*) be described by a wrong christian name in the will, a strong affidavit will be required, deposing to facts which warrant the recognition of the person claiming to be executor.

## CHAPTER XVII.

### ADMINISTRATION AND ADMINISTRATORS.

In case a person dies without making any testamentary disposition of his property, he is said to die intestate. In such case, or if he die testate without having appointed executors, or if these whom he has nominated cannot or will not act, the performance of those powers, duties, and functions, and the exercising of those rights, which ordinarily belong to executors, must be committed by the Surrogate Court to persons appointed by the Court for the purpose, called administrators. In the case of intestacy, the distribution of the estate is governed wholly by the law. If there be a will, the distribution is made in accordance with the testator's directions.

By the Common Law, as it stood at the time of Henry II., a man's goods were divided into three equal parts, of which one went to his heirs or lineal descendants, another went to his wife, and the third was at his own disposal. If he died without a wife, he might then dispose of one-half of his goods, the other half went to his children; if he had no children, the half went to his wife. If he has neither wife nor children, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the mode of enforcing recovery of them was by the writ *de rationabili parte bonorum*. This continued to be the law for many centuries, but the law was altered by imperceptible degrees, so that the deceased person might by will dispose of the whole of his chattels.

If, however, he died intestate, the king as *parens patriae* and general trustee for his people had power to seize the intestate's goods to provide for the burial of the deceased, the payment of his debts, the advancement of his wife and children, if he had any, and if not, then of his next of kin. The king continued to exercise this prerogative by his ministers, and prob-



ably in the County Court where matters of all kinds were determined, and it was granted as a franchise to many lords of manors, and others, who had, until the Court of Probate Act, 1857, a prescriptive right to grant administration to their intestate tenants and suitors, in their own Courts Baron and other courts, or to have their wills there proved if they made any disposition. Afterwards, the Crown in favour of the church, invested the prelates with this branch of the prerogative. It was said that this was done because spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased.

The goods therefore of the intestate were given to the ordinary by the Crown; and he might seize them and keep them without wasting, and also might give, aliene or sell them at his will, and dispose of the money in *pious usus*, as he had the disposal of the intestate's effects. It was thought natural and just that wills should be proved to the satisfaction of the prelate, who was by the will deprived of the power of distribution. Hence the issue of probate by the Ordinary grew up. In time the clergy took to themselves under the guise of the church and the poor, the whole residue of the estate after the *partes rationabiles*, or two-thirds of the wife and children, were deducted, without paying even his lawful debts and the charges thereon. To abate this evil the Statute, 13 Edw. 1., ch. 19, (Westminster 2), was passed. It enacted that the Ordinary shall be bound to pay the debts of the intestate so far as the goods will extend, in the same manner that executors were bound in case the deceased had left a will. Blackstone's Commentaries, Vol. II., p. 495. This enactment was but the legislative affirmative of the Common Law: *Snelling's Case*, 5 Co. Rep., 82 l; *Dyke v. Walford*, 5 Moo. P.C. 434. Though liable to creditors of the intestate for their just debts, the Ordinary had the residue of the estate still in his hands, with no restriction upon his disposal of it except such as his conscience might impose. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent

the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents, and therefore the Statute 31 Edw. III. ch. 2, provides that "in case where a man dieth intestate the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods; which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate in the King's Court, to administer and dispend for the soul of the dead; and shall answer also in the King's Court, to others to whom the said deceased was holden and bound in the same manner as executors, shall be accountable to the Ordinaries as the executors in the case of testament, as well as of the time past as of the time to come. See R.S.O. 1897, ch. 337.

The power of the Ecclesiastical Judge was a little more enlarged by 21 Henry VIII. ch. 5, which enabled the Ordinary to grant administration, or administration with the will annexed "to the widow of the deceased, or to the next of kin or to both, as by the discretion of the same Ordinary shall be thought good" and that "where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator, or person deceased, and where any person only deserveth the administration as next of kin where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration. See R.S.O. ch. 337.

This is the basis of the law relating to administration. In England, the Court of Probate Act, 1857, abolished the power of the Ecclesiastical, Manorial and other Courts to grant probate, and established the Court of Probate, which has since given place to the Probate Division of the High Court of Justice. In the various Provinces of Canada, courts modelled more or less nearly on the pattern of those in England, have been established for similar purposes.

The powers of administrators before the grant of administration were more restricted than those of executors. The latter derive their authority from the will, the former take theirs solely from the grant.

An executor as we have seen *ante* may bring an action, and it is sufficient if he have probate at the trial; but an administrator formerly must have had the letters of administration before suit at law: *Wooldridge v. Bishop*, 7 B. & C. 406; *Phillips v. Hartley*, 3 C. & P. 121. The rule was less strict in equity, there it was sufficient if they were granted before the hearing: *Fell v. Lutwydye*, 2 Atk. 120; *Davies v. Coleman*, 3 Jur. 948; *Moses v. Levi*, 2 Y. & C. 359; *Winn v. Fletcher*, 1 Vern. 873.

In *Humphries v. Humphries*, 3 P. Wms. 349, after a demurrer had been allowed, administration was taken out, and the bill amended to set up the grant. This was declared to be sufficient, as the letters of administration, when granted, related to the time of the death of the intestate, like the case where an executor before his proving the will, brings a bill, yet his subsequent proving the will makes such a bill a good one, though the probate be after the filing thereof. But see *Brown v. Higden*, 1 Atk. 291; *Simons v. Millman*, 2 Sim. 241.

Unlike that of an executor, a release given by an administrator before he takes out the letters of administration is not binding on him after the letters are issued: *Middleton's Case*, 5 Co. 28 l. Nor can he assign a term for years, or surrender a leasehold: *Rex v. Inhabitants of Great Glenn*, 5 B. & Ad. 188; *Bacon v. Simpson*, 3 M. & W.; *Doe v. Glenn*, 1 Adol. & Ell. 49. Nor is he estopped by having made a mortgage prior to his becoming administrator, *Metters v. Brown*, 1 Hurl & C. 686. He cannot give a notice before the issue of administration, under a partnership agreement which gave the administrator the right on notice to elect to take the deceased partner's place in the firm: *Holland v. King*, 6 C.B. 727.

It would seem from some of the cases that it is only when the

act is one for the benefit of the estate, that the letters of administration relate backward so as to validate it, if it be done after the death of the intestate, and before the grant of administration. For example, it has been held that the distribution of the assets of the estate amongst those entitled by kinship, before administration, is not an act for the benefit of the intestate's estate, and the person who subsequently takes out administration, though the distribution was made with his assent, will be entitled to recover the property as administrator: *Morgan v. Thomas*, 8 Ex. 302.

The general trend of the cases in equity is in favour of the view that the person who is entitled to administration may, as next of kin, file a bill relating to the personal estate. If administration has not actually been obtained, the defendant might demur or plead in abatement as the case may be. An amendment was, however, usually allowed to set up the grant of the letters of administration, upon their being actually taken out. On the other hand, if the plaintiff allege in his bill that he is the personal representative of the deceased, and has taken out administration, though the statement as to administration is not the fact, if objection is not made or pleaded thereto until the hearing, and then only *ore tenus*, it will be sufficient if proof be given that the plaintiff has obtained administration while the suit is pending; and, where a personal representative is not in existence, and is necessary to the plaintiff's suit, the Court, so far from treating the bill as one improperly filed, will often allow the cause to stand over, in order that the defect may be remedied. See *Perry v. Watts*, 2 Ph. 154; *Creasor v. Robinson*, 34 L.J. Ch. 392; *Bradmore v. Gregory*, 14 Beav. 589; *Edinburgh Life Ass. Co. v. Allen*, 19 Gr. 593.

It would seem, too, that the defendants need not, in equity, have actually taken out administration at the time a bill against them was filed. It was sufficient to enable the Court to grant full relief, if the administration was taken out by them before the hearing.



In *Horner v. Horner*, 23 L.J. Ch. 10, the law is thus stated: "It is said that the defendants must sustain the character of administrators when the bill is filed against them. By the same rule it would be necessary that a plaintiff, if he were to take out letters of administration, must sustain the character of administrator before he can file his bill; but that is not the case, and it would be quite sufficient for the plaintiff to obtain the letters before the case comes on for hearing, to give him a right of suit. Here the case is just the reverse, and the bill is filed against the parties who are about to take out administration, and they put in a plea saying that they were not administrators when the bill was filed. That is no plea in bar. It does not prevent relief being granted, if the administration is taken out before the hearing of the cause. The plea amounts to this, that because at a particular moment the administration was not granted, the plaintiff can have no relief, although when the suit comes to a hearing the administration will have been granted. My opinion is, that this is a useless plea, and is not tenable."

The opinion is expressed in the 13th ed. of Williams on Executors, p. 315, that the difference of practice between law and equity remains, notwithstanding the Judicature Act.

In *Elizabeth Pryse* (1904), P. 301, it is said that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death both as to real estate and to personalty. There is no real interest of the applicant for probate as executor according to the tenor of the will which is in the slightest degree taken away by the fact that what was granted was letters of administration with the will annexed as distinguished from probate.

The fusion of law and equity made by the Judicature Act of Ontario is more complete. It provides that, in all matters not particularly mentioned in the Act, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.



In *Trice v. Robinson*, 16 O.R. 433, the plaintiff sued the defendant for damages for the death of her husband while intoxicated, by liquor supplied by the defendant, an inn-keeper. The statute gave the right of action to the personal representative of the deceased. The action was begun three or four days before the issue of letters of administration to the plaintiff. The statute required the action to be begun within three months after the death, and the trial was not had until more than that time had elapsed. The verdict for the plaintiff was attacked on the ground that when her action was brought she was not administratrix, but it was upheld. It was sufficient that the action was brought within the time limited by the statute. "The rule in Chancery proceedings, as opposed to that at law, was, that it was not needful for a plaintiff, if he were the person to take out letters of administration, to clothe himself with the character of administrator before he could file a bill. It was sufficient for all purposes that he should obtain the letters before the case was heard. This being the equitable doctrine, as opposed to that at law, the Judicature Act directs the former to be preferred. So that now the rule in equity prevails for the benefit of this plaintiff," p. 436.

In one or two cases, it was held that it is necessary that the plaintiff who sues before the issue of letters of administration, in order that the letters of administration when issued will relate back to the death, be the person who is primarily entitled to the administration, or that he be entitled to apply for administration before his action is brought. And it was held that it is not sufficient that after the action is begun, he obtains a renunciation from the party with prior right to administer, and that he himself is then entitled. In *Chard v. Rae*, 18 O.R. 371, the action, which was begun on the 22nd of October, 1888, was on a judgment recovered against the present defendant on the 26th of October, 1868. The plaintiff was the son of the deceased judgment creditor. The plaintiff obtained letters of administration on the 4th of November, 1889, his mother, the widow of

the deceased judgment creditor, having the same day renounced her prior right to administer. The action was begun within twenty years, and was in time, if the plaintiff's *status* would support the action. It was held in this case that the doctrine that in equity the grant of administration relates back to the time of bringing the action, does not apply where the plaintiff is not the person primarily entitled to administer; and if the defence of the time when the letters of administration are obtained, is specially raised, not only must the action be brought, but administration must also have been obtained within the statutory period, or the action is barred, and judgment was entered for the defendant.

In *Doyle v. Diamond Flint Glass Co.*, 7 O.L.R. 747; 8 O.L.R. 499, the action was by one claiming to be the widow of the deceased person, for damages for injuries resulting in his death, caused, as was alleged, by the negligence of the defendants. The defendants denied that the plaintiff was the widow of the deceased, as he had a wife living when he married the plaintiff. The plaintiff then took out letters of administration, and by amendment claimed also in the character of administratrix. It was decided, following the last case, that the action must fail, because the plaintiff, when she brought her action, was not the administratrix, nor was she the person who had the right to be appointed administratrix. Until the real widow renounced that right, or for good cause was passed over by the Surrogate Court, no one else could claim to bring the action and succeed by shewing that the letters had been issued after the action began.

But *Chard v. Rae*, and *Doyle v. Diamond Flint Glass Co.*, were both considered by a Divisional Court in *Dini v. Fauquier*, 8 O.L.R. 712. It was there held that "the unqualified language of Lord Harwicke in *Fell v. Lutwidge*, expresses the rule which should be followed, viz., that letters of administration taken out after action and before trial, where the plaintiff brings his action as administrator, are sufficient to support the action. It is con-

trary to authority to divide administrators into two classes, those who have rightly obtained administration and those who have not, because the grant of letters of administration by the proper Court is conclusive while unrevoked, upon the question of the right to them, and no other Court can permit it to be gainsaid. *Attorney-General v. Partington* (1864), 3 H. & C., at p. 204; *Ivory* (1878), 10 Ch.D. 372; *Eades v. Maxwell* (1859), 17 U.C.R. 173, 180; *Book v. Book*, 15 O.R. 119."

"A plaintiff, therefore, suing as administrator and producing letters of administration at the trial, is justified in refusing to submit to any inquiry as to his right to appear in the character, and must, in my opinion, be treated as being the person who was entitled to obtain them at the time the action was begun."

We have considered who are entitled to be executors. The rules applicable to their capacity to act apply also to administrators. We have already noted the provisions of 31 Edw. III. St. 1, ch. 11, and of the extension of its terms by 21 Hen. VIII. ch. 5.

The right to be administrator of his wife belongs to the husband in priority to all others. "He is certainly the next friend and nearest relation. At common law no person at all had a right to administer, but it was in the breast of the Ordinary to grant it to whom he pleased, till the Statute of the 21st of Hen. VIII.; which gave it to the next of kin; and if there were persons of equal kin, whichever took out administration was entitled to the surplus; and for this reason the Statute of Distribution was made, in order to prevent this injustice, and to oblige the administrator to distribute."

29 Car. II. ch. 3, sec. 25 expressly excepts the husbands of *femes covert*s who die intestate, from the provisions of the Statute of Distributions, 22 & 23 Car. II. ch. 10. The distribution of *intestates'* estates in England is regulated by these statutes and by 1 Jac. II. ch. 17, sec. 7; 54 Vict. ch. 29 (Imp.). Under

these, if a married woman die, her husband is entitled to her entire personal estate. If she makes a will and appoints executors, her separate estate not disposed of by her will, belongs to her husband, the quality of separate property ceases on her death, notwithstanding the Married Woman's Property Act, 1882, (Eng.), and her executors become trustees to it for him, and not for her next of kin: *Re Lambert*, 39 Ch.D. 626.

In Ontario, however, the descent of the property of a married woman is altogether different. Section 5 of the Devolution of Estates Act reads: "The real and personal property, whether separate or otherwise, of a married woman, in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had predeceased her."

The right of the husband to administration was so strong that the Ordinary had no power or election to grant it to any other: *Sand*, 3 Salk. 22. The basis of the right has been by some said to be *jure mariti*, and it has been said that there is no statute which gives him the right: *Watt v. Watt*, 3 Ves. 244. On the other hand it has been said to be derived from the Statute 31 Edw. III., because he is "the next and most lawful friend" of his wife: *Sand*, 3 Salk. 22.

In England as the husband who survives his wife is entitled to the whole of her personal estate, her personal representatives are trustees for the personal representatives of the husband. *Re Lambert*, 39 Ch. D. 626; *Humphries v. Bullen*, 1 Atk. 458.

It is a settled principle established by the Ecclesiastical Courts that the right to the administration of the goods of an intestate follows the property in them; the grant follows the interest. Consequently as the Statute of Distributions, 22 & 23, Car. II. ch. 10, governs the succession to the property, it is the guide as to who are next of kin, so as to be entitled to administration. See R.S.O. ch. 335.



The next of kindred are determined by the rules, not of the common law, though that view prevailed at one time, but according to the rules of the civil law: *Lack v. Lock*, 2 Cass. temp. Lee 420.

In Ontario the Devolution of Estates Act vests the real property of a deceased person in his executors or administrators, subject to all the like rights, equities and obligations as if the same were personal property vested in them, and the same shall be distributed as personal property is hereafter to be distributed.

As the statute gives the husband only a share of his wife's property, real and personal, one-third if there be children, one-half if there are none, we may, perhaps, take it for granted that in Ontario upon the decease of the husband after the death of his wife, without his having administered to his wife's estate, his legal personal representative is not entitled, as in England, to administration in preference to the deceased wife's next of kin. His right, as well as that of his representatives, was based upon his interest, and if that interest did not survive his life, as under a settlement, her next of kin were preferred as administrators: *Fielder v. Hanger*, 3 Hagg. 769; *Gill*, 1 Hagg. 341; *Pountney*, 4 Hagg, 289.

In England, as we have seen, his right to his intestate wife's personal property was exclusive. And 29 Car. II. ch. 3, sec. 25, directs that the husbands of *femes covert*s, dying intestate, "may demand and have administration of their rights, credits and other personal estate, and recover and enjoy the same, as they might have done before the making of the 22 & 23 Car. II. ch. 10," (The Statute of Distributions). This continued the former exclusive right of the husband to his intestate wife's personalty. It is, however, repealed in Ontario to the extent that it is inconsistent with section 5 of the Devolution of Estates Act.

Accordingly in cases comprising real estate under the English Land Transfer Act, 1897, the heir-at-law of the wife had the



right to the grant of administration in priority to the representative of the husband: *Roberts* (1898), P. 149. See also *Barrett* (1898), P. 145.

The English Rule, being founded on the assumption that the beneficial interest vested in the husband and descended to his representative, and on the principle that the grant ought to follow the interest, is liable to be departed from in cases where it can be shewn that the beneficial interest did not survive his life, and that the wife's separate property has upon his decease, by the terms of the instrument constituting it, reverted to her own family: *Tristram and Coote*, 13th ed. p. 97.

The principle is well established that those originally entitled in distribution are to be preferred to those having a merely derivative interest. *Carr*, 1 P.D. 232; *Kinchella* (1894), P. 264.

In accordance with that principle the children of an intestate married woman, would, in Ontario, be entitled to administration in priority to the legal representatives of the deceased husband.

If a wife is judicially separated from her husband, or has obtained a protection order against him, administration limited to that portion of the wife's property which by the judicial decree vested in her apart from her husband's control as a *feme sole*, is granted to her next of kin, and a further administration in respect to the rest of her estate is granted to her husband: *Weir*, 2 Sw. & Tr. 451; *Ewing*, Hagg. 381; *Stephenson*, 1 P.D. 287. In the latter case the intestate's son was entitled to the whole of the property, and the husband was not cited. But generally speaking he should be cited: *Brighton*, 34 L.J.P. & M. 55. After the dissolution of the marriage he has no rights: *Hay*, 1 P.D. 51. Nor is he entitled to administration if, from any cause, the marriage is void: *Browning v. Reane*, 2 Phillim, 69.

The right of the husband to administer his wife's estate is not one which passes to his trustee in bankruptcy. But though such trustee is not entitled as of right, he may receive the grant under section 73 of the Court of Probate Act, which corresponds

to section 59 of the Surrogate Courts Act: *Jane Turner*, 12 P. D. 18.

The widow or the next of kin, or both, are entitled to the grant of administration under 21 Hen. VIII. ch. 5, sec. 3, at the discretion of the Ordinary making the grant, and a mandamus would not lie to compel the grant to be made to the widow, as that would interfere with the discretion: *Anon*, Stra. 525.

But the Court at all times prefers a sole to a joint administration, and where a joint grant is made to the widow and one of the next of kin, all of the other next of kin must consent that the grant shall be so made, and the consent of minors, some of them of tender years, is not sufficient: *Newbold*, 1 P.D. 285.

The widow is ordinarily preferred to the next of kin, but she may be set aside for good cause, and the grant made to the next of kin. A widow of dissipated habits who had eloped with another man in the lifetime of her husband, was passed over without citation. *Stevens* (1898), P. 126. But where misconduct is charged the widow is usually cited: *Anderson*, 14 P.D. 23. She may be passed over if she lived separate from her husband: *Lambell v. Lambell*, 3 Hagg. 568; or if she has been divorced from him: *Nares*, 13 P.D. 35; *Davies*, 2 Curt. 628; *Ryan v. Ryan*, 2 Phillim. 332; or has contracted a second marriage in his lifetime: *Conjers v. Kitson*, 3 Hagg. 556.

The remarriage of the widow does not deprive her of the right to administer: *Stretch v. Pynn*, Lee 30. But if all the other children of the intestate support the grant to one of them, this circumstance may induce the Court to make the grant to him: *Webb v. Needham*, 1 Add. 494.

In *Ihler*, 3 P. & D. 50, the Court refused an application to pass over the widow, who had been legally separated from her husband by reason of her cruelty, without citation. She could not be passed over without giving her an opportunity to oppose the application; and Sir James Hannen was disposed to think that there was no sufficient reason why she should be passed over,

inasmuch as she had not done anything by which her honesty could be called in question.

Where the widow is a lunatic, the grant has been made to her committee in preference to the next of kin: *Alford v. Alford*, Dea. & Sw. 322.

The reason frequently assigned for the preference by the Court of a sole to a joint administration, that an administrator, unlike an executor, cannot act alone, but all must act together, does not seem to be supported by the weight of authority, though in one of the old cases: *Hudson v. Hudson*, 1 Atk. 460, that view is expressed, and it seems to have been followed by Sir John Nicholl in *Warwick v. Greville*, 1 Phillim. 126, and in *Stanley v. Bernes*, 1 Hagg. 222. But in *Jacomb v. Harwood*, 2 Ves. Sen. 267, doubt is raised as to whether *Hudson v. Hudson* went so far as that, and it is mentioned that in *Willard v. Fern*, after three arguments in the King's Bench, it was held that one administrator stood upon the same footing as one executor, and a surviving administrator is in the same case as a surviving executor. In *Smith v. Everett*, 27 Beav. 454, Romilly, M.R., regards the law as settled.

Coke defines "the next and most lawful friends" and "the next of kin" to be "the next of blood who are not attainted of treason, felony, or have any other lawful disability."

Consanguinity or kindred, according to Blackstone, is the connection or relation of persons descended from the same stock or common ancestor. It may be lineal, ascending, as when one is descended in a direct line from the other, or descending, when the other is descended in a direct line from him; or it may be collateral, where they descend from the same ancestor, but not one of them from the other. The consanguinity, for example, of grandchildren and grandparents is lineal; that of grandchildren, the offspring of different parents, is collateral, and they are connected only through the common ancestor.

The mode of calculating the degrees in the collateral line for

the purpose of ascertaining who are the next of kin, so as to be entitled to administration, is to count upwards from either of the parties related, the intestate or the proposed administrator, up to the common ancestor, and then downwards again to the other of them, reckoning a degree for each person, both ascending and descending, or, in other words, to take the sum of the degrees in both lines to the common ancestor.

The rule of the civil law is *quot personae tot gradus*; computing up from *persona proposita*, the intestate whose estate is in question, to the common ancestor, and then down to the person claiming the relation to the intestate; and so many persons as are in this ascending and descending line, except the common ancestor, who is not reckoned as one, so many degrees. In this way the granddaughter of the sister of the intestate, and the daughter of his aunt are in equal degree. From the intestate to his father or mother is one degree, from the father to his daughter, the intestate's sister is a second degree; from the daughter to her grandchild two more, making four degrees in all. In that case the intestate's father is the common ancestor. The daughter of the intestate's aunt would have as common ancestor, a grandparent. From the propositus to the grandparent is two degrees, from the grandparent to the aunt's daughter, two more, so that the granddaughter of the sister, and the daughter of the aunt are in the same degree: *Thomas v. Kitteriche*, 1 Ves. Sen. 333.

The expression "next of kin according to the Statute of Distributions" is one frequently, though inaccurately, used. The statute of 22 & 23 Car. II. ch. 10, orders distribution among children and representatives of deceased children, amongst brothers and representatives of deceased brothers; and the term "next of kin according to the statute" comprehends people who are next of kin in one degree, and children of children who are of kindred in a degree more remote, or brothers who are of kindred in one degree, and children of brothers who are of kindred



in a degree more remote. The term "next of kin" is not accurately used in such cases, because persons other than the next or nearest of kin, are comprised in it. And although it has sometimes been considered that this extended and inaccurate meaning of the term has become so far prevalent and of common use, that it might be properly attributed to it in a case not controlled by the context, yet, in deeds and wills, the expression is often used in such a way as to exclude any supposed intention of comprising amongst the next of kin those who being in a degree of propinquity more remote, might, under the statute take by representation. And it has now been settled that the expression "next of kin," when used *simpliciter*, does not include such persons as could only take by representation under the Statute of Distributions. To this extent, therefore, it has been determined that the persons who are entitled to distribution in case of intestacy are not, for that reason only, to be deemed next of kin of a person deceased: *Withy v. Mangles*, 4 Beav. 366. For the Statute of Distributions, 22 & 23 Car. II. ch. 10, see R.S.O. ch. 335.

The Statute of Distributions admits no representatives amongst collaterals after brother's and sister's children.

In one case the question to be decided was whether the grandchildren of the brothers and sisters of the intestate's mother were entitled to participate by representation of their deceased parents, with the two daughters of the deceased sister of the intestate's father, in the distribution of the estate. The Statute of Distributions, 22 & 23 Car. II. ch. 10, was applicable, and the children of the deceased sister were held to be entitled to the exclusion of the grandchildren. Section 37 of the Devolution of Estates Act does not make sections 38 to 55 applicable to descents after the 1st day of July, 1886: *Re McEachren*, 10 O.L.R. 499.

Under the Devolution of Estates Act, father, mother, brothers and sisters are entitled to share equally in the estate of an intestate who dies without issue. The children of a deceased brother or sister are entitled to the share of their deceased parent: *Walker v. Allen*, 24 A.R. 336.



Several distinctions have been engrafted upon the law.

Relations by the father's side and the mother's side are in equal degree of kindred to the intestate: *Blackborough v. Davis*, 1 P. Wms. 53.

The half-blood is admitted to administration as well as the whole blood; but, other things being equal, the contestant of the whole blood is preferred: *Stratton v. Linton*, 31 L.J.P.M. & A. 48. But there is a discretion to grant to either: *Brown v. Wood*, Aleyn 36. And they are equally entitled in distribution: *Re Wagner*, 6 O.L.R. 752; *Re Adams*, 6 O.L.R. 697.

If other things are precisely equal, the elder brother would be preferred to the younger (but not otherwise): *Warwick v. Greville*, 1 Phillim. 125.

When the intestate dies without wife or child, leaving a father, the father is entitled to the administration exclusive of all others: *Ratcliff's Case*, 3 Co. 40a. If the father be dead, the mother is entitled: *Ib.* The statute 1 Jac. II. ch. 17, deprived the mother of the intestate who died without wife or children after the death of his father, of the exclusive right to the whole estate. It gave every brother and sister, and the representatives of them, an equal share with her. See R.S.O. ch. 335, sec. 5.

Section 6 of the Devolution of Estates Act (Ont.), gives the father, mother, brothers and sisters an equal share upon the death of an intestate without issue, and they are to be preferred to the grandfather or grandmother: *Walker v. Allen*, 24 A.R. 336.

The grandfather, being in the second degree, is preferred to an uncle, who is in the third: *Blackborough v. Davies*, 1 P. Wms. 41.

The lineal is preferred before the collateral of the same degree; but the next of kin, though collateral, is preferred before one, though lineal, that is more remote: *Ib.*, per Holt, C.J., p. 51.

Those of equal degree are equally entitled to administration, whether male or female, subject to the discretionary power of the Court: *Brown v. Wood*, Aleyn 36.

But in the exercise of that discretion, unless there are objections of a substantial kind to him, a son is preferred to a daughter: *Chittendon v. Knight*, 2 Cas. temp. Lee 559.

Children are preferred to parents, and so are the children's descendants to the remotest degree: *Evelyn v. Evelyn*, Ambler 192.

The brothers and sisters are preferred to the grandfather and grandmother, both as to administration and distribution, to the exclusion of the grandparents: *Evelyn v. Evelyn*, 3 Atk. 762.

If the sole next of kin is a married woman and she renounces, her husband, notwithstanding her renunciation, is entitled to the grant: *Hayne v. Mathews*, Sw. & Tr. 460.

If the majority of interests desire that administration shall be granted to a person whom they have selected, he will generally be preferred to others of an equal degree of kindred; but circumstances may justify a disregard of the nomination of the majority: *Stainton*, 2 P. & D. 212.

Other things being equal, a man of experience in business affairs is given the preference: *Williams v. Williams*, 2 Phillim. 100.

In a contest amongst the next of kin for administration, that one of them is a creditor is rather against his claim than for it: *Webb v. Needham*, 1 Add. 494.

A creditor's title to administration is said to be inferior to that of all others. The ground for making the grant to him is that he may recover his debt. He is entitled, though his debt be barred by statute, unless when two creditors contend for the right to administer. The practice in England now is to require a bond from the creditor to pay all the debts rateably and proportionately, without any preference of his own debt, before granting him administration: *Brackenbury*, 2 P.D. 272; *Belham* (1901), 2 Ch. 52. See R.S.O. 1897, ch. 132.

The right of the creditor to take out administration is not given by any statute, but has arisen by the practice of the Court,

and in his case the Court is entitled to the fullest discretion in regard to making the grant, or passing him over for another, if he be in any respect unsuitable.

A creditor is given letters of administration, as a general rule, only when every other representative fails to act: *Webb v. Needham*, 1 Add. 494.

It is necessary when a creditor applies for administration to cite the next of kin and all those entitled in distribution. In Ontario, under section 41 of the Surrogate Courts Act, only those who are resident within the Province need be cited: *Carr v. O'Rourke*, 3 O.L.R. 632. The general rule, except in so far as it is modified by that section and section 59, is that whenever a person has a right to the administration he must be cited or consent: *Barker*, 1 Curt. 592; *Keene*, 1 Sw. & Tr. 267; *Pegg v. Chamberlain*, 1 Sw. & Tr. 528. Where the estate is small citation is dispensed with in some cases. In *Teece* (1896), P. 6, it was dispensed with on evidence that the next of kin had notice of the application. In *Callicott* (1899), P. 189, the ground for dispensing with citation was that the next of kin had not been heard of for many years, and were thought to be dead.

It not unfrequently happens that the grant is made to some other creditor than the one instituting the proceedings: *Andrews v. Murphy*, 4 Sw. & Tr. 99.

If the next of kin appear to the citation, the grant will be made to them in priority to a creditor, but if there has been undue delay on the part of the next of kin, the creditor will be allowed his costs of the proceedings: *Cole v. Rea*, 2 Phillim. 428.

In the case of persons dying intestate without any known relations, the citation is issued against the next of kin, if any, and all persons having or pretending to have any interest in the estate of the deceased. By Rule 76 of the English Rules, such citation is also required to be served upon the King's Proctor or the Solicitor for the Duchy of Lancaster. In Ontario the Surrogate Judge would, no doubt, direct service upon the Attorney-General as representing the Crown in the event of an escheat.

An illegitimate person has no lawful relations but his own legal issue. He is, in the eye of the law, the child of nobody. If he dies intestate, without widow or issue, his estate escheats to the Crown.

It is the established practice of the Court not to grant administration in the capacity of creditor to one who has bought up a debt after the death of the intestate: *Coles*, 3 Sw. & Tr. 181; *Day v. Thompson*, 3 Sw. & Tr. 169; *Downward v. Dickinson*, 3 Sw. & Tr. 569.

Letters of administration have been granted to the executors of a creditor: *Jones v. Beytagh*, 3 Phillim. 635. The husband of one who has partly administered as a creditor may receive administration *de bonis non* as the legal personal representative of his wife after her decease, but not in his own right as a creditor: *Risdon*, 1 P. & D. 637.

The widow and next of kin having failed to appear to a citation, the Court of Probate made a general grant of administration to a receiver appointed by the Court of Chancery to collect and get in the estate, by reason of an action having been brought in that Court by creditors against the widow, who was charged with having taken possession of part of the estate: *Mayer*, 3 P. & D. 39. See also *Moore* (1892), P. 145.

In case there are no known relatives and no residuary legatee has been named in the will, administration with the will annexed, limited to the estate disposed of by the will, may in special circumstance be made to a stranger: *Jackson* (1892), P. 257.

In England, by Probate Rule 32 (1862): "In the case of a person residing out of England, administration or administration with the will annexed, may be granted to his attorney acting under a power of attorney."

Such letters of administration are expressed to be "for the use and benefit" of the person so represented by the attorney. The form of the letters of administration does not affect the rights of those beneficially entitled to the estate: *Anstruther v.*



*Chalmer*, 2 Sim. 5. The form of these limitations is set out in full in *De la Viesca v. Lubbock*, 10 Sim. 760. In that case it was held that owing to the grant to the attorney of a person abroad for his use and benefit, the principal might sue the English administrator without taking out administration himself or joining those beneficially interested as parties. This was approved in *Eames v. Hacon*, 18 Ch. D. 347.

In *Chambers v. Bicknell*, 2 Hare 536, it was decreed that such an administrator is liable to be sued by those beneficially interested, in respect of the estate of the intestate, to the same extent as if he had administered in his own right.

In *Re Rendell* (1901), 1 Ch. 230, it was held that a principal who has not constituted himself legal personal representative of the deceased in any country, cannot give a good discharge to his attorney who has administered, and such attorney is responsible for the distribution of the assets. The Court approved the view expressed in the case of *In re Dewell*, 4 Drew 273, where it is said in reference to *Chambers v. Bicknell*, 2 Hare 536, "that is a clear decision that the person to whom administration is granted, on the nomination of the person entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claim of other persons"; and again, "when the administrator is once constituted, he is liable to all claims by persons who are entitled to claim against the estate." Such grants are made to the attorney, as the lawful attorney of the principal, until he shall duly apply and obtain letters of administration of the property of the deceased himself.

In other respects the rule is to make the grant to the attorney as extensive as his principal would have been entitled to, if he had applied for it himself: *Goldsborough*, 1 Sw. & Tr. 295.

In the grant of administration the following order of priority is observed.

1. Husband or wife.
2. Child or children.



3. Grandchild or grandchildren.
4. Great-grandchild or other descendants.
5. Father.
6. Mother.
7. Brothers or sisters.
8. Grandfathers or grandmothers.
9. Uncles, aunts, nephews, nieces, great-grandfathers, great-grandmothers.
10. Great-nephews, great-nieces, cousins german, great-uncles, great-aunts, etc., according to the proximity of kindred; all those who are in the same degree being equally entitled.

The accompanying table indicates the degree of relationship up to the ninth:—



Before administration will be granted to those who have only an inferior claim to the grant, all of those who have a superior claim must be disposed of either by renunciation or by citation. The next of kin are preferred to those who are more remote, and their rights must be got rid of before the remote claimants to administration can receive the grant.

The English Rule 28 (1862) provides that "where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the Registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin."

The Surrogate Courts Act (Ont.), section 41, enacts that "in case application is made for letters of administration by a person not entitled to the same as next of kin to the deceased, the next of kin, or others having or pretending interest in the property of the deceased *resident in Ontario*, shall be cited or summoned to see the proceedings, and to shew cause why the administration should not be granted to the person applying therefor; and if neither the next of kin nor any person of the kindred of the deceased happens to reside in Ontario, then a copy of the citation or summons shall be served or published in such manner as may be provided for by the rules or orders in that behalf."

It is to be observed that this section is applicable to every case where the applicant is not the person entitled as of right to administer.

The citation of the next of kin, or of the kindred, or of those claiming the right, is restricted to those resident in Ontario, if there are any resident: *Carr v. O'Rourke*, 3 O.L.R. 632.

If there is no next of kin resident in Ontario, and no kindred resident therein, the citation is to be by advertisement.

In *Carr v. O'Rourke*, 3 O.L.R. 632, only one of the next of kin, a sister of the intestate, resided in Ontario. Upon the consent of the sister and of her children, letters of administration

were granted by a Surrogate Court to the husband of the sister's daughter. A brother of the intestate residing in the United States brought an action in the Surrogate Court to set aside the grant, and to have it declared that he, as the only lawful brother of the intestate, was entitled by law to a grant of letters of administration. The sister was old and illiterate, and without business experience to fit her for the duties of the office. The brother, plaintiff in the action, was old, feeble, and nearly blind, and from physical infirmities, unfit to be appointed. "By the provisions of section 41 of the Surrogate Courts Act it is only the next of kin resident in Ontario who are required to be cited or summoned when the application is made by a person not entitled to the grant as next of kin of the deceased."

"The Surrogate Court, therefore, had before it all those who are required to be cited or summoned, and the consent and request of all of them, that the respondent should be appointed administrator, and having regard to the nature of the property left by the deceased, which consisted of a farm as well as of considerable personal property which required to be looked after, and the age of the sister and her illiteracy, it cannot be said that the Judge of the Surrogate Court exercised his discretion improperly in directing the grant to be made to the respondent."

Surrogate Court Rule 21 substitutes a Judge's order for a citation to accept or refuse probate of a will, or to accept or refuse letters of administration, and in all similar cases, and also for a subpoena to bring in a testamentary paper, and gives such order the same effect as the citation or subpoena formerly had in these and all similar cases.

Forms of orders in lieu of citation to accept or refuse letters probate or letters of administration, are given in the appendix.

Rule 30 substitutes advertisements in such newspapers, local, British, or foreign, as the Judge may direct, for citation against all persons in general, and other instruments which under former practice were served by posting in some public place.

Rule 31 provides that citations under section 41 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, may be served by inserting the same as advertisements in such one or more of the Toronto morning papers, or such other papers, local, British or foreign, as the Judge of the Court may by special order direct.

All such orders in lieu of citation are made upon affidavit setting out all the facts necessary to support the order. Orders in the nature of a citation or subpœna are served personally, when that can be done. The residence of the person to be cited should be set out in the affidavit for the order, or if the applicant is unable to give it, the efforts made to obtain it, and the reason of the failure, should be made to appear.

Personal service of the order is made, as in the case of other orders, by leaving a true copy of the order with the person served, and by shewing him the original with the seal of the Court thereon, if that be required by the party served.

Service upon minors should be effected upon the minor in the presence of his natural or legal guardian, or at least of that of some person who at the time has properly undertaken the care and custody of the minor: *Cooper v. Green*, 2 Add. 454; *Brown v. Wildman*, 28 L.J.P. 54; *Lainson v. Naylor*, 2 Sw. & Tr. 7. When the custodian and next of kin of the minors evade service, the service made upon the minors has been held sufficient: *Lean v. Viner*, 3 Sw. & Tr. 469.

The practice is to serve both the lunatic and his committee, if any. If there is no committee, service should be made upon the lunatic in the presence of a physician: *Anna Hepburn Surtees*, 28 L.J.P. 89.

When there are other persons who are in the same interest as the lunatic, and the lunatic is resident abroad, there being no friend of hers in the jurisdiction who would probably look after her rights, a citation to her was refused: *Ward v. Huckle*, 12 P.D. 110.

In *McCormick v. Heyden*, 17 L.R. Ir. Ch. D. 338, service was ordered to be made on a lunatic in the presence of the proprie-



tress of the asylum where she was confined, and also on her three next of kin, and it was ordered that this should be good service unless good cause to the contrary was shown within ten days after the service.

The time usually given in Ontario for appearance to an order in the nature of a citation is ten days, under Rule 28. But if the person cited resides out of Ontario, or is cited by advertisement, the time is fixed by the order, and will vary according to the distance, and the facilities for communication. In England it is usually thirty days after service.

Administration will not be granted to an infant, but if he be the person entitled, he must be cited, and the administration may be granted to his guardian, or to some other person *durante minore ætate*: *Stewart*, 3 P. & D. 244.

The grant of probate to an infant along with a person who is of full age, does not come within the prohibition to be found in (Imp.) 38 Geo. III. ch. 87, sec. 6, which is confined to cases where the infant is sole executor or administrator. Such a grant to an infant is not a nullity: *Cumming v. Landed Banking and Loan Co.*, 20 O.R. 382. But a grant of letters of administration to an infant as sole administrator is a nullity, being against the prohibition of the statute, which is in force in Ontario, and confers no office, vests no estate, confers no right to sue or be sued, and will not bind the estate: *Merchants Bank v. Monteith*, 10 P.R. 334.

See also Surrogate Court Rule 17, which regulates the grant to the guardians of infants *durante minore ætate*, and requires the consent of the infant when he is fourteen years of age and over.

Subject to the provisions of section 41 of the Surrogate Courts Act, an alien resident abroad is entitled to administration as fully as if he were domiciled here and were a British subject. But an alien infant, though by the law of the country where the deceased was domiciled such an infant is entitled to the grant, will not be permitted to take administration here. The

law of the country in which the proceedings are taken governs in that particular, rather than the law of the domicile: *Duchess of Orleans*, 1 Sw. & Tr. 253.

The minor could not execute the bond required under our law before the grant could be made.

A married woman may now be an administratrix without the consent of her husband, though that was formerly necessary. Under R.S.O. 1897, ch. 163, sec. 20: "A married woman who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued without her husband, as if she were a *feme sole*," and the word "contract" in that Act includes the acceptance of the office of executrix or administratrix: Section 2. If she is ordered to pay into court for the better securing of the trust fund, the order will not be restricted to apply only to her separate estate, but will be general in its form, and an attachment may issue for disobedience to the order: *In re Turnbull* (1900), 1 Ch. 180. But if the order is made, not for the better securing of the funds, but to compel the married woman to make good her devastavit, the recovery is limited to her separate property, both in the judgment and in the execution issued thereunder: *Scott v. Morley*, 20 Q.B.D. 120.

The next of kin under the statute is the person who comes within that description at the time of the intestate's death, and not the person who, by reason of the death of persons entitled in priority, occupies that position when the grant is made: *Savage v. Blythe*, 2 Hagg. Appendix 150; *Almer v. Almer*, *Ib.*

It is the almost invariable practice in England to require that a person entitled in distribution should be cleared off before making a grant to the representative of the next of kin, unless the Court should by order dispense with a citation to them, and such order, though it might perhaps be made independently of it, will usually be made under the 73rd section of the Act: *Kinchella* (1894), P. 264.

The law in that regard is thus epitomized in *Carr*, 1 P. & D., at p. 232: "There are three propositions established. The first is that the Court is not bound by the statute to make the grant to the party entitled in distribution. The second is that the general practice that prevails would enable the party entitled in distribution to obtain the grant on application at the registry, the right of a party originally entitled being preferred to a party having a derivative interest. The third proposition is that the whole matter is in the discretion of the Court."

The special circumstance in that case to cause the executrix of the person who was the deceased administrator and next of kin of the intestate, to be preferred to the person entitled in distribution to the estate, were these. The only assets were what might be recovered in a suit then pending in which the deceased administrator was plaintiff, and in which he had an interest with reference to the costs incurred in it. The person entitled in distribution was residing in the service of the defendant in the action, and it was thought undesirable that there should be any suspicion that the real merits of the suit would not be contested by reason of an understanding between these two parties.

Section 73 of the Court of Probate Act, 1857, section 59 of the Surrogate Courts Act (Ont.), enables the Court in special circumstances, such as insolvency, to pass over those who would be entitled to administration either upon an intestacy or upon the unwillingness or incompetency of the executor to take probate, or if the executor is resident out of the province, and to grant administration to some person other than the one who, if it were not for this section, would be lawfully entitled to it. In the circumstances which give rise to the application of the power, the grant may be made to such person as the Court thinks fit. The security required is left in the discretion of the Court, and the administration may be general, or as limited as the Court thinks fit.

Under this section and the clause of the Land Transfer Act, 1897, which gives the heir at law an equal right to the grant

with the next of kin, a husband who was dissipated and was mis-managing a public house belonging to the estate, so as to imperil the license and lessen the value of the property, was passed over, and administration was granted, in preference, to the guardian *ad litem* of the minor son of the intestate wife by a previous marriage, limited to the use and benefit of the minor until he attained the age of twenty-one years: *Arden* (1898), P. 147.

In *Carr v. O'Rourke*, 3 O.L.R. 632, it is said that the practice of the Surrogate Courts of Ontario appears to be to apply the provisions of section 59 more liberally than do the English Courts the corresponding provision (section 73) of the English Probate Act, and there is no reason why the more liberal practice thus adopted should not be continued. Before the change in the law made by that section "it was obligatory on the Court in case of intestacy to commit the administration to the next and most lawful friends of the deceased, 31 Edw. III. ch. 11, or to the widow of the deceased, or to the next of kin, or to both, 21 Hen. VIII. ch. 5, sec. 3, and therefore the Court had no jurisdiction to commit the administration to a stranger, but now the Court is empowered by section 59, in its discretion, to commit the administration to a stranger, if there are special circumstances which, in its opinion, make it necessary or convenient to do so."

"The cases decided on the analogous provisions of the English Court of Probate Act, 1857, have given a somewhat narrow construction to it, and it is possible on the facts of this case the English Probate Court might not have exercised its discretion in favour of making the grant to the respondent." In the result, action and appeal were dismissed, and the husband of the sister's daughter was confirmed as administrator, in preference to a brother of the deceased.

It does not appear that there is any provision in the English Act corresponding to section 41 of the Ontario Statute.

There must be "special circumstances" to enable the Court to pass over the persons entitled in priority to probate or admin-



istration, and these special circumstances must be such as will justify the Court in so doing: *Wilde*, 2 Sw. & Tr. 457.

The 73rd section of the Act (59th in Ontario) does not give the Court power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of the Court; and there must be super-added a necessity or convenience that such person should not be allowed to act: *Samson*, 3 P. & D. 48.

Misconduct prior to the making of the will and known to the testator is not, in the absence of more recent charges against the executor sufficient "special circumstances," coupled with absence from the jurisdiction, to justify the Court in passing over the executor: *Ib.*

The terms of the 73rd section are very general, and give the most extensive power to the Court to make grants under special circumstances to persons who would not, but for the section, be entitled to them. A grant was therefore made to a stranger under this section of the estate of an insolvent who had been assisted in his lifetime by a relative of his deceased wife, by whom also his debts were paid after his death. One of the next of kin renounced, and the only other was a lunatic, his next of kin renounced on his behalf. The grant was made to the relative of the deceased wife, though he was neither creditor, nor of kin: *Bateman*, 2 P. & D. 242.

The guardian of a lunatic widow, sole executrix and residuary legatee of a deceased testator, refused to allow her to be personally served with a citation, though the guardian was served. Under this section, administration with the will annexed was granted to a creditor without personal service: *Atherton* (1902), P. 104. For other grants to creditors under this section, see *Fraser*, 1 P. & D. 327, where the sole person entitled died without administration, and his personal representative renounced the grant; *Farrands*, 1 P.D. 439, where the next of kin of a



deceased manufacturer said to be insolvent, was a woman of low position in life, totally unfit to wind up the business; *Wensley*, 7 P.D. 13, where the person entitled to represent the estate refused to do so.

The grant is sometimes made to a trustee named in the will, as in *Cosnahan*, 1 P. & D. 183, where the widow was passed over, it appearing from the testamentary instrument that the testator did not intend her to administer, and did intend the trustee to control the estate, though not executor according to the tenor. So also in *Stewart*, 3 P. & D. 244, where the executrix appointed by the will was a minor, and the next of kin in Australia, the grant was made to the trustees who were directed by the will to divide the property if the daughter died a minor.

In *Jane Turner*, 12 P.D. 18, the grant was made to the trustee in bankruptcy of the deceased husband, who had left the country before administration was taken out. See also *Agnese* (1900), P. 60.

The grant has been made to the attorney of a married woman whose husband would not consent to her acting as executrix, she being "willing but not competent to take probate" without such consent, as the law then was: *Clerke v. Clerke*, 6 P.D. 103. Also to the attorney of a married woman who was residuary legatee, without notice to the husband, the residue being settled to her separate use: *Pine*, 1 P. & D. 388.

The guardians of minors have often been appointed administrators under this section, the grant being limited. In *Batterbee*, 14 P.D. 39, such a grant was made to a maternal aunt whom the infant universal legatee had elected to be her guardian for the purpose, one executor named in the will being dead, and the other resident in Brazil.

A residuary legatee has been appointed, under this section, as administrator with the will annexed, without notice to the executor, he having left the country in embarrassed circumstances leaving no address, after having commenced proceedings to take out probate: *Mary Massey* (1899), P. 270.

The testator's widow and sole beneficiary was granted letters of administration in *Crawshay* (1893), P. 108, without notice to the executor, who before the death of the testator had left the country under an assumed name, not intending to return.

The grant may be made to a foreign or colonial executor according to the tenor, of administration with the will annexed, in a case in which the English Courts would not recognize him as executor according to the tenor, he being entitled by the law of the domicile to be the personal representative: *Earl*, 1 P. & D. 450.

The next of kin being resident abroad, out of the jurisdiction, the grant was made to a sister of the intestate, limited to the use and benefit of the next of kin until such time as the grant should be made to the next of kin or his attorney: *Chollwill*, 1 P. & D. 192.

The mother being willing to renounce her right to letters of administration, the grant was made under section 73 to the sister of the intestate, though the mother's second husband, stepfather of the intestate, was alive and abroad, it being thought unreasonable to put the parties to the expense of obtaining his renunciation: *Llanwarne*, 1 P. & D. 306.

Administration has been granted to the nominee of the guardians of the poor, limited to the use and benefit of the next of kin, of a pauper lunatic, during her lunacy: *Eccles*, 15 P.D. 1; *Everley* (1892), P. 50.

The grant has been made to a stranger when, for example, there has been doubt as to the legitimacy of the next of kin: *Hopkins*, 3 P. & D. 235; *Menshull*, 14 P.D. 151.

A cousin has been entrusted with administration under this section: *Roberts*, 1 Sw. & Tr. 64; *Drinkwater*, 2 Sw. & Tr. 611.

So also has the committee of the sole next of kin who, through mental infirmity arising from age, is incapable of managing her affairs; the grant was made general for the use and benefit of the next of kin: *Leese* (1894), P. 160.

In *Bryant* (1896), P. 159, the grant of administration of the deceased husband's estate, was made to the executor of the widow, she being entitled to the whole of the property, as it was under £500.

The next of kin of an intestate being abroad and inaccessible without long delay, a grant was made to an accountant in whose hands were the books of the firm of which the deceased was a member, limited to such time as the next of kin should apply, but general in its scope, it appearing that immediate representation was necessary to preserve the personal property: *Suarez* (1897), P. 82.

To put an end to litigation amongst those who were entitled to the estate, the parties agreed upon a compromise, which was based upon the administration of the estate by a stranger in blood, formerly employed by the testator to audit his accounts. The Court upon the consent of all parties, and upon an affidavit of his fitness being filed, granted to him administration with the will annexed. These facts constituted "special circumstances" to bring the case within the section: *Re Potter, Potter v. Potter* (1899), P. 265.

But in the absence of special circumstances to justify a departure from the rule that the grant of administration must be made to the person entitled to the property, the Court refused to make a grant to two of those entitled in distribution and the nominee of the next of kin, though all parties interested had consented, the absence of special circumstances excluded the application of section 73: *Richardson*, 2 P. & D. 244; *Haynes v. Mathews*, 1 Sw. & Tr. 460.

When the Court sees fit to exercise the power conferred by section 59 of the Surrogate Courts Act, Ont., to appoint an administrator other than the person who but for that enactment would have been entitled to the grant, Surrogate Court Rule 13 requires that the fact should be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Administration is sometimes granted because of the *spes successionis* to one who has no interest in the estate of the deceased. Thus, administration with the will annexed, may be granted to one of the next of kin of the universal legatee and devisee, on the renunciation and consent of the latter; or, if a testator were to leave all his property to his mother, who is his sole next of kin, and appoint her sole executrix, administration with the will annexed may be granted to her next of kin, upon filing her renunciation and consent. Administration, on account of the *spes successionis*, has been granted with the will annexed, to the next of kin of the testator's next of kin, who were entitled to the lapsed residuary estates, and who had renounced and consented: *Hinckley*, 1 Hagg. 477.

When the father of an intestate, who died a bachelor, was entitled to all his property, upon the renunciation and consent of the father, administration might be granted to his brother as the natural and lawful son of (A.B.) who is the natural and lawful father and next of kin of the deceased; though he has no interest in the estate, on the principle that the intestate's brother was his father's next of kin, and as such had a *spes successionis* to the intestate's property.

In *Keane*, 1 Hagg. 692, administration was granted to the son of the deceased's brother, such brother, as the sole next of kin, being the only person entitled to the personal estate, he having renounced and consented: *Johnson*, 2 Sw. & Tr. 559.

In *Blagrove*, 2 Hagg. 83, administration was granted to the son of a deceased brother, who was the sole next of kin, on the renunciation of his executrix and universal legatee, and of certain nephews and nieces entitled with him in distribution. Though he had not a direct interest, he was acting under the person entitled to a moiety of the property.

The grant has been refused to a nephew of the intestate's next of kin, but allowed to the daughter of the next of kin.



## CHAPTER XVIII.

### THE DISTRIBUTION OF ESTATES.

We have seen that the general principle governing the grant of administration is that the party entitled to the property in distribution is ordinarily entitled to priority when he seeks administration, and that the party who is originally entitled is preferred to one who has only a derivative interest: *Carr*, 1 P. & D. 232.

A brief epitome of the law governing the distribution of the estates of deceased intestate persons in Ontario is often of assistance in determining who is entitled to administer.

The distribution of estates, real and personal, in Ontario, is now governed by the Devolution of Estates Act, R.S.O. 1897, ch. 127; the Statute of Distributions, 22 & 23 Car. II. ch. 10, and 1 Jac. II. ch. 17; R.S.O. ch. 335.

The Devolution of Estates Act, sections 3 to 10 applies, by section 3 of that Act, as amended by 2 Edw. VII. ch. 1, sec. 3.

(a) "To all estates of inheritance in fee simple, and all estates held by the deceased for the life of another, in any tenements or hereditaments in Ontario whether corporeal or incorporeal. See *Wilson v. Butler*, 2 O.L.R. 576. The section applies to an equitable estate of inheritance in fee simple: *Re Bower Trusts*, 9 O.L.R. 199.

(b) To chattels real in Ontario.

(c) To all other personal property of any person who has died domiciled in Ontario.

Provided that all real and personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment shall be deemed to be within the provisions of this section, if otherwise applicable."



By the 4th section all such property upon the death of the owner devolves upon and rests in the legal personal representatives, and is subject to the payment of his debts. This is regardless of the disposition of such property made by the testator in his will. In so far as there has been no valid and binding disposal of the property by will, deed, or contract, it is to be disposed of in the same way as personal property. The distinction between real property and personal property, so far as concerns the mode of descent, is abolished: *Re Ross and Davies*, 7 O.L.R. 433.

It must be noted that, as the executors take their title from the will, it is necessary to the validity of a deed, that all of the executors who have not lost their right to probate by renunciation or by their failure to appear and take probate when cited, must join in the deed. It has been decided under the corresponding section of the Land Transfer Act, 1897, that a deed by the two executors who have proved the will, there being a third to whom power has been reserved to come in and prove upon his return to this country from abroad, is ineffectual to pass the legal estate; for the statute vests the estate in all three, and not in the two who have proved. But it would be otherwise if the third executor had renounced: *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58. But by 21 Henry VIII. ch. 4, sec. 1, it would be otherwise in case of a devise to executors to sell.

The provision in question, sec. 1, sub-sec. 1, reads:

“Where real estate is vested in any person without a right in any other person to take by survivorship it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him.” And where a testator had appointed special executors for the Australian property, and general executors who proved the will in England, the Australian executors not being entitled to probate in England could not be considered as personal representatives within the Act; and the conveyance of land in

England by the general executors was valid: *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187.

Sub-sections 2 and 3 of section 4, deal with dower and tenancy by the courtesy, and preserve the rights of wives and husbands under the former law. The widow's dower remains unless she elects in favour of the distributive share given to her by this Act. The husband will take the distributive share of his wife's estate given by the Act unless by deed or instrument executed within six months after his wife's death he elects to take the share to which he would have been entitled if the Act had not been passed.

Sub-section 4 requires the security to be given by administrators to be fixed with reference to the real property as well as the personal property.

Section 5 enacts that:

"The real and personal property, whether separate or otherwise, of a married woman in respect of which she dies intestate, shall be distributed as follows: One-third to her husband if she leaves issue, and one-half if she leaves no issue, and subject thereto shall go and devolve as if her husband had pre-deceased her."

It is worthy of special notice that this section deals with *all* the property of a married woman *whether separate or otherwise*.

In conjunction with this section must also be read section 23 of "The Married Woman's Property Act," R.S.O. 1897, ch. 163, which reads: For the purpose of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would have or be if she were living."

Section 6 of the Devolution of Estates Act enacts that "When a person shall die without leaving issue, and intestate as to the whole or any part of his real or personal property, his father surviving shall not be entitled to any greater share under the

intestacy than his mother or any brother or sister surviving; nor shall a grandfather or grandmother of a person dying intestate share in competition with a surviving father, mother, brother or sister."

By this section and the old Acts the children of a deceased brother or sister take the share to which their parent would have been entitled, if alive.

"Save as altered by this section the old Acts are still in force." "By the first section of the 22 & 23 Car. II. ch. 10, if there were children, the mother, brother or sister took nothing, neither did the father. By section 7, if there were no children and no wife, the father took all; and if there was no wife or father, then by that section as amended by 1 Jac. II. ch. 17, sec. 7 (R. S.O. ch. 335, sec. 5), mother, brother and sister took equal shares, including the children of deceased brothers or sisters. Such children taking their parent's share among them. . . . Because in every case in which a mother, brother or sister surviving is entitled to a share under these Acts, the children of a dead brother or sister are also entitled, so I think the father can take no more than a mother, brother or sister could take under those circumstances, and that leaves a share for the children of any brother or sister who may be dead. There is nothing given expressly by this section to mother, brother or sister. The gift is solely by implication, and I think the implication makes it necessary to hold that the children take a share when the father survives just as they do when he does not." *Walker v. Allen*, 24 A.R. 336. This case overrules *Colquhoun*, 26 O.R. 104.

In this connection attention may be called to section 36 of The Wills Act, Ontario, corresponding to section 33 of The Wills Act, 1837 (Imp.). "Where any person being a child or other issue of the testator, to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise

or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will." Under this provision, by virtue of section 5 of the Devolution of Estates Act, the spouse of a child who died in her mother's lifetime takes one-third of the share intended by the parent's will for such child, and her children take the remaining two-thirds: *Re Hunt*, 5 O.L.R. 197; *Re Scott*, [1901] K.B. 228.

But if the gift is to children as a class, only those children who are alive at the death of the testator are within the class, the gift being construed as shewing an intention on the part of the testator that the class shall take so far as the law allows: *In re Coleman and Jarrow* (1876), 4 Ch.D. 165. Section 36 of the Wills Act does not apply to gifts to children or grandchildren as a class: *Re Harvey*, *Harvey v. Gillow*, [1903] 1 Ch. 567; *Re Williams*, 5 O.L.R. 345; *Re Clark*, 8 O.L.R. 599.

The 7th section of the Devolution of Estates Act makes residuary devises and bequests of realty and personalty applicable to the payment of debts, rateably in proportion to their respective values.

But it does not authorize an executor to resort to specifically devised real estate to pay the costs of a suit in which he has not succeeded: *In re Champagne, St. Jean v. Simard*, 7 O.L.R. 537.

Section 8 requires the written consent of the official guardian of infants or an order of the High Court to render valid a sale of lands in which infants are interested, and which could not devolve on the personal representatives but for this Act.

This section must, it would seem, be read in the light of the modifications made by section 16 which is of later origin and the provisions of which are inconsistent with those of section 8: *Re Fletcher's Estate*, 26 O.R., at p. 504. But see now 6 Edw. VII, ch. 23.

It is only when the sale is made by the personal representatives for the purpose of distribution, as for instance when lega-



cies are charged upon land, that the consent of the official guardian is requisite on behalf of infants, lunatics or non-concurring heirs: *Ib.*

“I think this section, 16, was intended to make it clear that executors had power to sell for purposes of distribution where there were no debts as well as where there *were* debts; and I think the consent of the official guardian, on behalf of infants, lunatics and non-concurring heirs or devisees, is only necessary when the sale is for the purposes of distribution only, which is not this case”: *Re Ross and Davies*, 7 O.L.R. 433.

If the testator has devised the lands to the executors upon trust, for instance to sell and convey, or has directed them to sell the land so that the real property vests in them by force of the devise, then as such devisees in trust or under such direction the executors have power to sell and convey without the consent of the official guardian though there are infants, and without the concurrence of the heirs, unless the will requires such concurrence: *Koch v. Wideman*, 25 O.R. 262; *Hewett v. Jermyn*, 29 O.R. 383; *Mercer v. Neff*, 29 O.R. 680.

In the same connection it may be observed that by 21 Hen. VIII. ch. 4, sec. 1: “Such sale may be validly made by such one or more of the executors as shall take upon him, or them the care and charge of the said will, and a conveyance by such executor or executors shall be as valid and effectual in law as if all the executors had joined therein”: R.S.O. ch. 337, sec. 12.

The personal representative may sell though there are no debts: *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O.R. 397. But he cannot exchange lands: *Tenute v. Walsh*, 24 O.R. 309; though he may lease or mortgage lands for the purpose of paying debts, 2 Edw. VII. ch. 17, sec. 5; *Re Bennington*, 18 Ch.T. 239; he may renew a lease pursuant to the covenant of the lessor to renew: *Re Canadian Pacific Ry. Co. and National Club*, 24 O.R. 205.

We may summarize the law governing the distribution of



estates, real and personal, upon the death of the owner, since the 1st day of July, 1886.

We have seen that a widow is entitled to elect whether she will take dower or a distributive share of her husband's *undisposed of* real estate in lieu of all claims to dower arising by reason of her husband's death: Devolution of Estates Act, sec. 4, sub-sec. 2.

And that her husband instead of accepting the distributive share of his wife's real estate to which he is entitled under the Devolution of Estates Act, may within six months after the wife's death elect to take as tenant by the curtesy: sec. 4, sub-sec. 3.

Subject to these exceptions, real property within the Act is distributed in the same way as personal property.

The mode of distribution is as follows:

*If the Intestate die leaving:      His personal representatives take thus:*

Wife and child or children..	{	One-third to wife, rest to child or children; if children dead, then to their representatives (that is, their lineal descendants), except such child or children as had estate by settlement of intestate or were advanced by him in his life-time equal to the other shares.
Wife only . . . . .	{	\$1,000 to wife (R.S.O. ch. 127, sec. 12, sub-sec. 1); half of residue to wife; rest to next of kin, in equal degree to intestate or their legal representatives, or if no next of kin, to the Crown.
No wife or child . . . . .	{	All to the next of kin and their legal representatives.

Child, children, and children of deceased child . . . . .	{ All to him, her or them, <i>per stirpes</i> .
Children by two wives . . . . .	{ Equally to all.
If no child, children or representatives . . . . .	{ All to next of kin, in equal degree to intestate.
Child and grandchildren of deceased child . . . . .	{ Half to child, half to grandchildren, who take <i>per stirpes</i> .
Husband only . . . . .	{ Half to him and half as if he had pre-deceased intestate (R.S.O. ch. 127, sec. 5).
Husband and child or children. . . . .	{ Third to husband and two-thirds to children.
Father and mother . . . . .	{ Equally to both.
Father, mother, brother or sister . . . . .	{ Equally to all. (See R. S.O. ch. 127, sec. 6); children of any deceased brother or sister take share of deceased parent <i>per stirpes</i> ; <i>Walker v. Allen</i> , 24 A.R. 336.
Mother and brother or sister . . . . .	{ Whole to them equally.
Wife, mother, brother, sister and nieces, nephews . . . . .	{ \$1,000 to wife. Half of residue to wife, residue to mother, brothers, sister and nieces, but nephews and nieces take <i>per stirpes</i> );
Wife and father . . . . .	{ \$1,000 to wife. Half of residue to wife, half to father.
Wife, mother, nephews and nieces . . . . .	{ \$1,000 to wife. One-half of residue to wife, one-fourth to mother, and one-fourth to nephews and nieces.
Wife, brother or sister and mother . . . . .	{ \$1,000 to wife. Half of residue to wife (under R.S.O. ch. 335, sec. 2). Half to brothers and sisters and mother equally.

Mother only .....	The whole.
Wife and mother .....	{ \$1,000 to wife. Half of residue to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half-blood. ....	
Posthumous brother or sister and mother .....	{ Equally to both.
Posthumous brother or sister and brother or sister born in life-time of father ....	
Father's father and mother's mother . . . . .	{ Equally to both.
Uncle or aunt's children, and brother's or sister's grandchildren . . . . .	
Grandmother, uncle or aunt.	All to grandmother.
Two aunts, nephew and niece	Equally to all.
Uncle and deceased uncle's child . . . . .	{ All to uncle.
Uncle by a mother's side, and deceased uncle's and aunt's child. . . . .	
Nephew by brother and nephew by half-sister .....	{ Equally, <i>per capita</i> .
Brother or sisters, and nephew or nieces. . . . .	
Nephews by deceased brother, and nephews and nieces by deceased sister . . . . .	{ Equally, <i>per capita</i> .
Nephews and nieces and children of deceased nephew or niece . . . . .	
Brother and grandfather ...	All to brother.

Brother's grandson and brother or sister's daughter. . . . .	}	All to daughter.
Brother and two aunts . . . . .		All to brother.
Brother and wife . . . . .	{	\$1,000 to wife. Half of residue to brother and half to wife.
Mother and brother . . . . .		Equally.
Wife and mother, and children of deceased brother or sister . . . . .	{	\$1,000 to wife. Half of residue to wife, one-fourth to mother, one-fourth <i>per stirpes</i> to deceased brother or sister's children.
Wife, brother or sister, and children of deceased brother or sister . . . . .	{	\$1,000 to wife. Half of residue to wife, one-fourth to brother or sister <i>per capita</i> , one-fourth to deceased brother or sister's child, <i>per stirpes</i> .
Brother or sister and children of a deceased brother or sister . . . . .	{	Half to brother or sister <i>per capita</i> . Half to children of deceased brother or sister <i>per stirpes</i> .
Grandfather and brother . . . . .		All to brother.
The grandchildren of the deceased brothers and sisters of the intestate's mother; and the children of the deceased sister of the intestate's father. . . . .	{	The children of the deceased sister of the intestate's father take all: <i>Re McEachern</i> , 10 O.L.R. 499.

The amendment made in 1906 by 6 Edw. VII. ch. 23, since it has been brought into force, makes the consent of the Official Guardian, or of one of the Local Judges or Local Masters appointed under sub-section 2 of section 8, necessary in every sale by executors or administrators where infants are concerned. The effect of sub-section 1 of section 16 as substituted is to make section 16 subject to the provisions of sections 8 and 9.



Sub-section 1 deals with sales which are not made "for the purpose of distribution only." The consent of the heirs or devisees is not necessary when the sale is made by the executors or administrators for the payment of debts, but the concurrence of the Official Guardian will be necessary by reason of section 8 if infants are concerned.

Sub-section 2 deals with sales by personal representatives for the purpose of distribution only, and the powers and duties of the Official Guardian, on behalf of lunatics and non-concurring heirs and devisees, is where he thinks it advisable to exercise them, the same as in the case of infants.

Sub-section 3 deals with the division of the real property by the personal representative amongst the heirs. The consent of the Official Guardian upon behalf of infants, lunatics, and non-concurring heirs, is put on the same footing as in cases of sale under sub-section 2.

The 4th sub-section indicates that the administrator whose letters are limited to personal property is not within the section, and it also provides that it shall not derogate from any rights which the personal representative possesses apart from the Act.

The Act has been brought into operation by an order passed on the 14th day of September, 1906, as required by 6 Edw. VII. ch. 19, sec. 18, and it is in force since the 15th day of September, 1906.

The amendment is as follows:—

3. Section 16 of the Devolution of Estates Act is repealed and the following substituted therefor:—

16. (1) Subject to the provisions of sections 8 and 9 of this Act, executors and administrators in whom the real and personal estate of a deceased person is vested under this Act shall have as full power to sell and convey such real estate for the purpose not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto whether

there are debts or not as they have in regard to personal estate and in no case shall it be necessary that the persons entitled to such real estate as heirs or devisees shall concur in any such sale except where sale is made for the purpose of distribution only.

(2) No sale of any such real estate made for the purpose of distribution only shall be valid as respects any heirs or devisees beneficially entitled thereto unless such heirs and devisees concur therein: Provided always that where lunatics are beneficially entitled as heirs or devisees or where there are other heirs or devisees who do not concur in the sale by reason of their place of residence being unknown or where in the opinion of the Official Guardian appointed under the Judicature Act it would for any reason be inconvenient to require the concurrence of such heirs or devisees or where in his opinion it would be advisable to dispense with such concurrence, the Official Guardian may, upon proof satisfactory to him that such sale is in the interest and to the advantage of the estate of such deceased person and the persons interested therein, approve such sale on behalf of such lunatics, non-concurring heirs and devisees and any such sale made with the written approval of the Official Guardian aforesaid shall be valid and binding upon such lunatics, non-concurring heirs and devisees to all intents and purposes whatsoever; and for this purpose the Official Guardian aforesaid shall have the same powers and duties as he has in the case of infants.

(3) Such executors and administrators shall also have power with the concurrence of the persons beneficially entitled thereto, or where there are infants or lunatics, with the approval of the Official Guardian aforesaid, to divide the said estate of such deceased person or any portion or portions thereof amongst the persons entitled thereto according to their respective shares and interests therein, and the power of division conferred by this sub-section may also be exercised although all the persons beneficially interested do not concur, if the Official Guardian signifies his approval in manner aforesaid and the Official Guardian may approve any such division on behalf of non-concurring heirs or

devises under the same conditions and with the same effect as in the case of a sale under sub-section 2 of this section.

4. This section shall not apply to any administrator where the letters of administration are limited to the personal estate, exclusive of the real estate, and shall not derogate from any right possessed by an executor or administrator independently of this Act.

## CHAPTER XIX.

### PRACTICE.

**How administration is obtained.**—Much that has been said in reference to probate is applicable to administration.

(1) Proceedings are begun in the same way by petition. The petition should set out the death and place of abode of the intestate, the intestacy, the persons who are entitled to represent the deceased, and who as next of kin are entitled to share in the estate, the value of the property, and all other facts to shew the jurisdiction of the Court to which application is made, and the nature of the claim of the petitioner to the grant.

Section 61 of the Surrogate Courts Act enables the person entitled to administration to take out letters limited to the personal estate only; and before the 1st day of July, 1886, when the Devolution of Estates Act came into force in Ontario, and the real property first devolved upon the personal representatives, administration could only be granted to personal property. The executor or administrator as such had no power over anything but moveables.

It must be observed, however, that no person entitled to a grant of administration generally is permitted to take a limited grant except as provided in section 61 of the Surrogate Courts Act: Rule 15.

No administration is allowed to issue until fourteen days after the death of the deceased, unless under the direction of the Judge: Rule 4. The English Rule 44 (1862) is to the same effect. This is only a re-enactment of a very ancient rule of the Ecclesiastical Courts. If there are special reasons for relaxing the rule, as, for instance, if the effects are perishable; or if an opportunity for an advantageous sale of some of the effects had offered and would be lost by delay, the Judge has power to relax the rule.

(2) The renunciations of all persons having a prior claim, who have not been got rid of by citation.

(3) The administrator's oath must be so worded as to clear off all persons having a prior right to the grant, and in such cases the grant itself should shew on its face how they have been cleared off: Rule 11.

If the grant is being made under section 59 of the Act, that fact must be made to appear in the oath of the administrator: Rule 13.

(4) The affidavit of death and place of abode is the same as upon the application for probate.

(5) The petitioner must file an affidavit shewing that search for wills or testamentary papers has been made in all places where the deceased usually kept his papers, and in his depositories. This affidavit should be made by the applicant. It may be, however, that he may be personally unable to say whether there is a will or not; in such cases the proof may, with the Judge's consent, be made otherwise. It must also be shewn that search has been made in the office of the Registrar of the proper Surrogate Court, and the certificate of such Registrar shall be sufficient proof of such search having been made. See Surrogate Court Rule 6.

(6) The proof as to the value of property devolving, and the inventory and valuation of real and personal property, are the same for administration as for probate, except in the case of persons dying before the 1st day of July, 1886, leaving by will a power of disposition of real estate. In that case the proofs upon an application for administration with the will annexed must shew the value or probable value of the real property over which such power extends. Surrogate Courts Act, sec. 58.

(7) The affidavits and the two schedules, in duplicate, under the Succession Duty Act, are also the same.

(8) A bond with sureties is required from all persons who apply for administration. Section 69 of the



Surrogate Courts Act, R.S.O. 1897, ch. 59, requires that except when otherwise provided by law, every person to whom a grant of administration is committed shall give a bond to the Judge of the Surrogate Court from which the grant is made, to enure for the benefit of the Judge of the Court for the time being (or in the case of the separation of counties, to enure for the benefit of any Judge of a Surrogate Court to be named by the High Court, for that purpose) with one or more surety or sureties, as may be required by the Judge of such Surrogate Court, conditioned for the due collecting, getting in and administering the real and personal estate of the deceased, and the bond shall be in the form prescribed by the rules and orders now in force or hereafter made under this Act, and in cases not provided for by such rules and orders, the bond shall be in such form as the Judge of the Surrogate Court may by special order direct: *Staff v. McGarrow*, 35 U.C.R. 22. The application for an order to assign the bond should be on notice to the sureties: *Re Hills*, 1 Ch. Ch. 386.

(9) If the application is for administration with the will annexed, the will, the affidavit of execution, and the affidavit of plight must be brought in, as upon an application for probate.

Section 70 directs that the penalty of the bond shall be double the amount under which the value of the real and personal estate and effects have been sworn.

To this there are two exceptions. If the testator died before the 1st day of July, 1886, when the Devolution of Estates Act came into effect, the real estate is taken into account only to the extent that, by the terms of the will itself, the administrators with the will annexed, are clothed with power of disposition over it. The value or probable value of the real property so coming under the control of the administrator with the will annexed must be disclosed in the affidavits of the value of the property. The condition of the bond must provide that the administrator shall well and truly pay over and account for, to the persons entitled to the same, all moneys and assets to be received by him for

or in consequence of the exercise by him of any power over real estate created by the will or codicil: Section 58.

Prior to the date named, administration in Ontario, like administration in England before the 1st day of January, 1898, related only to personal property.

The second exception to the penalty of double the value of the estate, real and personal, is where the Judge thinks fit to reduce the amount, as he may do.

Provision is also made by the same section for taking more bonds than one, under the direction of the Judge, so that the whole amount of security may be made up by the bonds of as many sureties as may be necessary, and the Judge in his discretion permits.

Upon breach of the bond, an application is made to the Judge on motion or petition, and he orders the Registrar of the Court to assign it to the person named in the order, sufficient proof of the breach having been given. The person to whom it is so assigned may then enforce the bond by action in his own name: Section 71.

Rule 7 requires that unless the Judge shall otherwise order, the Registrar shall, along with the application for grant of administration, submit the bond proposed to be given, together with the affidavit of execution and the affidavits of justification of the sureties.

The bond must, by the same rule, be without material alteration or interlineation. The prescribed forms of the bond and of the affidavits are set out in the appendix to the rules.

The bond must be in the prescribed form, or as near thereto as the circumstances of the case admit: Rule 32.

The rules and orders made pursuant to section 88 of the Surrogate Courts Act are sanctioned by the legislature, and a bond in the form prescribed by the rules is sufficient, though it be alleged that it does not conform to the statutes: *Bell v. Mills*, 25 U.C.R. 508.

When the grant is a special one under section 59 of the Surrogate Courts Act, that fact must appear in the oath of the administrator, in the letters of administration and in the administration bond: Rule 13.

The sureties must always justify, and the amounts for which they severally become bound and justify must in the aggregate amount to the penalty of the bond (Rule 33). Where the value of the property is under \$200, one surety may be taken without a Judge's order, but if of greater value there must be two sureties, unless the Judge orders otherwise, in double the value of the property: Rules 34 and 35.

R.S.O. ch. 220, sec. 5, gives power to the Surrogate Judge, in his discretion, to accept the bond or policy of guarantee companies approved by Order in Council, in whole or in part, in lieu of the security required by section 69 of the Surrogate Courts Act. The interim receipt may be accepted at the time, but the formal bond must be completed within one month.

The Ontario Trust Companies Act, R.S.O. ch. 206, authorizes companies incorporated under the Act for that purpose to accept and execute the office of executor or administrator, to manage trust estates, and the estates of minors and lunatics, but not to act as guardian of the persons of infants, or committee of the persons of lunatics. Such company may be appointed alone or jointly with another person, and the Act declares that it shall not be necessary for such company to give any security for the due performance of its duty as executor, administrator, etc., unless otherwise ordered, notwithstanding any Act or rule of practice requiring security from those who occupy such offices.

The Lieutenant-Governor in Council may by Order in Council revoke such privilege, after which such trust company must give the same security as any private person.

It is not sufficient, in an action on an administration bond, to shew that the administrator received assets. These may have been applied in payment of debts, or may be still in hand not wasted or misapplied. It was said in *Earl of Elgin v. Cross*,

10 U.C.R. 256, that merely nominal damages can be recovered in such an action where there is no decree or judgment directing distribution of the moneys received, following *Archbishop of Canterbury v. House*, 1 Cowp. 140. But this was doubted in *Neill v. McLaughlin*, 4 P.R. 312, in which it was held that the want of a decree may be a good defence to an action for not distributing; but it is no ground for staying the action on the administration bond, nor is the want of a citation for an account, nor the omission to shew the receipt and misappropriation of funds. On a breach for not administering, full damages may be recovered: *Archbishop of Canterbury v. Robertson*, 1 Cowp. 140.

Since the fusion of law and equity the question is of less importance.

We have already observed that in the event of intestacy without any known kindred, notice of an application for letters of administration by creditors or others should be given to the Attorney-General, following the analogy of the English rule. The Attorney-General may then take out letters of administration to the estate, to him and his successors in office, without giving security; but he and his successors in office are subject to the same obligations as to realizing and distributing the estate as an ordinary administrator.

The powers of the Attorney-General are not limited to the estates of those who leave no known relatives, but extend to intestacy where there are no known relatives within the province and no known relatives elsewhere who can be readily communicated with. Such grant may be general, or limited. See R.S.O. 1897, ch. 70.

Whenever a person dies intestate leaving no relations of any degree whatever, his property escheats to the Crown. The Crown, so far as concerns escheats, is represented by the Lieutenant-Governor of the province, and the escheat is for the benefit of the province, and not of Canada: *Attorney-General v. Mercer*, 8 A.C. 767.



The Crown in the case of a bastard who dies unmarried and without issue, takes the estate beneficially, and is accountable to no one: *Dyke v. Walford*, 5 Moo. P.C. 434.

So too with any other intestate dying without widow or next of kin.

When the intestate leaves a widow, but no issue or other next of kin, the widow, after the payment of the debts and testamentary expenses is entitled to \$1,000 out of the estate absolutely, and one half of the residue: R.S.O. ch. 127, sec. 12. The other half of the residue escheats to the Crown: *Cane v. Roberts*, 8 Sim. 214.

The widow has also a statutory title to such goods of the intestate as are exempt from seizure under the Execution Act: *Re Tatham*, 2 O.L.R. 343.

But when the Crown takes under the statute in the absence of the next of kin, it takes only as trustee and must account to those beneficially entitled: *Kane v. Maule*, 23 L.J.Ch. 638; R. S.O. ch. 70.

The Act respecting Escheats, R.S.O. ch. 114, gives full power to the Government to hand over such portions of the intestate's estate to which the Crown has become entitled by escheat, to any persons who have a legal or moral claim upon the intestate. In practice a considerable portion of such estates has always been divided amongst the natural, though unlawful, relations of the deceased.

Considerable influence is also allowed to any ineffectual testamentary intentions of the deceased. In the estate of Andrew Mercer, before referred to, about one-fourth of the estate was given by the Government to a natural son of the intestate, and the rest of the estate was expended in the establishment of the Mercer Reformatory.

The affidavit of value of the property devolving, and the inventory and valuation of the real property and the inventory and valuation of the personal property, while under Surrogate



Court Rule 8 all the proofs to lead grant may be embodied in one affidavit, are more conveniently prepared on separate forms.

The enactment requiring an inventory of all the personal property to be made by the executor or administrator before grant of probate or administration, is very old. 21 Hen. VIII. ch. 5, sec. 4, declares that "the person applying for a grant of probate, or administration, shall, before the same is granted, make or cause to be made a true and perfect inventory in duplicate of all the property which belonged to the deceased at the time of his death; such inventory shall be verified by the applicant, upon his oath, to be good and true; and one copy thereof shall be delivered by him into the keeping of the proper Surrogate Court having power to grant probate of the testament or letters of administration to the estate of the deceased, and the other copy thereof shall remain with the person to whom the grant is made. R.S. O. 1897, ch. 337, sec. 1. Sub-section 2 of the same section makes it incumbent upon the personal representative to file a further inventory, verified by oath, of property discovered subsequent to the grant, and so not included in the former inventory. This must be done within six months of the discovery of the property.

Surrogate Court Rule 5 makes it necessary to shew, in the petition, the whole value of the property, and the separate value of the personal and real property, and full particulars and an appraisement of all such property must be filed with the petition, duly verified by oath.

The additional forms prescribed by the rules made under the Succession Duties Act must be completed and filed, in duplicate.

These forms are referred to in the chapter dealing with that Act.

The papers which the applicant for letters of administration require to file are as follows:—

1. The petition.
2. The renunciations of those having a prior right.
3. The administrator's oath.
4. The affidavit of death and place of abode of the testator.

5. The affidavit of intestacy.
6. The affidavit of value of all the property devolving.
7. The inventory and valuation of the real property.
8. The inventory and valuation of the personal property.
9. Proof of advertisement in the *Ontario Gazette*, in cases within section 39 of the Surrogate Courts Act.
10. The affidavit of value and relationship prescribed by the Succession Duties Act, in duplicate, and the schedules thereto in duplicate.

In preparing these papers observe the practical directions given at the end of Chapter XVI.

## CHAPTER XX.

### ADMINISTRATION WITH THE WILL ANNEXED.

Though a deceased person has made a will, it sometimes happens that he omits to appoint an executor; or the executor dies in his lifetime; or after his death before taking probate; or refuses to accept probate of the will, the refusal being shewn either by his renunciation, or by his failure to appear to a citation; or is incapable of acting, or becomes incompetent to act; or dies before the estate is administered without having appointed an executor who would succeed to the administration; or at the time of the testator's death is absent from the province or country, and by reason of the insolvency of the estate of the deceased or other special circumstances, the Court deems it necessary or convenient by virtue of section 59 of the Surrogate Courts Act, Ont., section 73 of the Wills Act, 1837 (Imp.), to pass him by and appoint some other person to administer the estate.

In all these cases the Court will grant letters of administration, with the will annexed. The ordinary incidents attach to the office of administrator; but in his dealings with the estate he is guided by the terms of the will. Where the estate has been partly administered, and it becomes necessary, by reason of the death of the executor or administrator, to appoint another administrator, this is called administration *de bonis non administratis*, or, more briefly, administration *de bonis non*.

In all cases of administration with the will annexed, the will must be proved as though probate was applied for; and security must be given as in case of intestacy.

In the Surrogate Courts Act, Ont., "administration" shall include all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes: sec. 2, sub-sec. 2.

21 Hen. VIII. ch. 5, sec. 3, determined that the grant of administration should be "to the widow of the deceased, or to the next of his kin, or to both as by the discretion of the same Ordinary shall be thought good." See R.S.O. 1897, ch. 337, sec. 5. This provision applies only where the person dies intestate, or the executor named in his will refuses to prove the same.

Many instances of administration with the will annexed are not within the above statute, and in those cases which are not within the statute of administration, the Court is left to the exercise of its discretion in the choice of an administrator, and no person has such a legal right to preference as can be enforced at law: *Ewing*, 6 P.D. 25. The Court is not bound to grant administration to a legatee, as it is to the next of kin, whose rights are derived from the statute: *Rex v. Bettesworth*, 2 Str. 956.

The right to administration with the will annexed in such cases follows the right to the property. The sisters of the testator may be preferred to the widow if the former takes the larger share of the property to be distributed: *Homan*, 9 P.D. 61; *Gill*, 1 Hagg. 341.

It is said by Dr. Lushington in *Brenchley v. Lynn*, 16 Jur. 226, that "To couple the grant with the interest is, for the most part, one of the leading principles of this Court; and is, I think, one of the safest principles on which it can go." This rule will be departed from when there is a statutory right to the administration.

See sections 41 and 59 of the Surrogate Courts Act, Ont., the latter being section 73 of the Wills Act, 1837 (Imp.).

The practice of the Ecclesiastical Courts, in the cases where the grant of administration was not within the statute, was, in the absence of special circumstances, to consider which of the claimants had the greatest interest in the effects to be administered, and to decree administration accordingly: *Wetdrill v. Wright*, 2 Phillim. 243.

In *Woodfall v. Arbuthnot*, 3 P. & D. 108, the trustees appointed by an order of the Court of Chancery in the place of the residuary legatees in trust who had been appointed by the will, applied for administration with the will annexed, the executors having renounced or failed to appear to a citation. As it appeared that the trust estate vested in the new trustees under the order without a conveyance from the former trustees, administration was granted as prayed.

And where a testator bequeathed his property to his executors in trust for such persons as a certain person named in the will should by deed appoint, and that person executed a deed of appointment which exhausted the power, administration was granted with the will annexed to the appointees under the deed, the executor having renounced: *Martindale*, 1 Sw. & Tr. 8. In *Pine*, 1 P. & D. 388, the grant was made to the nominee of the residuary legatee without notice to her husband, the residue being her separate property and at her absolute disposal.

Though the next of kin are within the letter of the statute of Henry, upon the renunciation of the executors, and by the letter of it are entitled to administration, yet the spirit of the enactment has been held to exclude them where there is a residuary legatee, on the ground that in such circumstances, the next of kin have no interest. "The reason that the statute of 21 Hen. VIII. required that administration should be granted to the next of kin was upon the presumption that the intestate intended to prefer him; but now the presumption is taken away, the residuum being disposed of to another; and to what purpose should the next of kin have it, when no benefit can accrue to him by it? And it is reasonable that he should have the management of the estate, who is to have what remains of it after the debts and legacies are paid:" *Thomas v. Butler*, 1 Ventr. 219; *Taylor v. Diplock*, 2 Phillim. 276; *Gill*, 1 Hagg. 341.

And this though there be no immediate prospect of any residue: *Ib.* The residuary legatee is preferred to other legatees and to annuitants: *Atkinson v. Barnard*, 2 Phillim. 316.



Upon the failure of the residuary legatee in trust, the grant of administration with the will annexed is made to the person especially entitled to the residuary estate: *Hutchinson v. Lambert*, 3 Add. 27.

This is done though the residuary legatee is a trustee. In *Walsh v. Gladstone*, 1 Phillim. 290, a legacy was given to a certain person to be applied to the use of a Roman Catholic college, and, the legatee having died in the testator's lifetime, the Court of Chancery held that though the legatee might have had a discretion if he were living, as to the application of the fund, yet it would have been a fair exercise of this discretion to have paid it over to the president of the college, and that, if the Court was satisfied that the funds would be safe in his hands, it would be justified in doing the same. In *McAuliffe*, 1895, P. 290, the residuary legatee was to dispose of the residue "as she shall think fit at her discretion for the benefit of a convent. The residuary legatee in trust having died before the testatrix, administration with the will annexed was granted to the Reverend Mother of the convent, following the authority of the last case.

Upon the death of the residuary legatee who is beneficially entitled, after the death of the testator, the representative of the residuary legatee has the same right to administration with the will annexed as the residuary legatee had, in preference to the next of kin or to legatees: *Wetdrill v. Wright*, 2 Ph. 242; *Re Thirlwall*, 6 Notes of Cases 44. That holds good, too, though the residuary legatee be also named in the will as executor: *Ysted v. Stanley*, Dyer, 372a.

Though the practice is to grant administration with the will annexed to the residuary legatee, the Court is not bound by any fixed rule of law to make the grant to him. A mandamus will not be issued to compel the grant of administration *cum testamentis annexo* to the person beneficially entitled, under the will, to the residue, on the ground that this sort of administration is

not within the statute: *Rex v. Bettesworth*, 2 Str. 956; *Ewing*, 6 P.D. at p. 25.

If the same person is both next of kin and residuary legatee, there is no discretion to refuse him the grant; he is entitled to it both by the law and the practice: *Linthwaite v. Galloway*, 2 Car. temp. Lee 414.

If there is no residuary legatee or if he declines, the grant of administration with the will annexed is usually made to the next of kin, if he has an interest; but if he has no interest he may be excluded, and the grant made to a creditor or other person who has an interest: *West v. Willby*, 3 Ph. 381; *Hinckley*, 1 Hagg. 477; *Ley*, [1892] P. 6; *Jackson*, [1892] P. 257.

In all cases, the parties having a higher title to the grant must be cited if resident within Ontario. See section 41 of the Surrogate Courts Act, and *Carr v. O'Rourke*, 3 O.L.R. 632.

The following extract from Tristram & Coope's Probate Practice, 13th ed., p. 58, indicates how the selection is made where there are several residuary legatees.

"If there be several persons equally interested in the residuary estate, any one may take without the consent of or notice to the others."

"If the residue of the personalty be given to two persons, and the share of one of them has lapsed to the testator's next of kin, a grant is made indifferently to the remaining residuary legatee or to the next of kin, on the residuary devisee being first cleared off."

"The representatives of the residuary legatee in such a case would not be entitled to a grant without clearing off the next of kin and all persons entitled in distribution to the lapsed portion of the residuary estate."

"If there be a residuary legatee or devisee taking one portion of the residue absolutely, while a life interest is given to another in the remaining portion of the residue, the grant will be

made to the one or the other indifferently, according to priority of application.

“If two or more persons have been appointed residuary legatees, the personal representative of any one of them who may be dead, will not be allowed to take a grant unless all living persons interested in the residuary estate of the deceased are cleared off.”

“And it is almost superfluous to say that the representatives of a sole residuary legatee stand in precisely the same position as the deceased whom he represents.”

“If the residue be left to such only of the testator’s children as shall attain twenty-one years, so as not to vest until then, but the interest and profits be directed in the meantime to be applied to their maintenance, the Court will make a grant to their guardian, in preference to the persons substituted on the contingency of all the children dying before they have attained a vested interest in the property bequeathed.”

An executor who resides out of the jurisdiction, may claim probate of the will. Special circumstances may arise under section 59 of the Surrogate Courts Act (sec. 73 Imp.), which will enable the Court to refuse him probate. Instead of making the application himself he may appoint an attorney within the jurisdiction to receive a grant of administration *cum testamento annexo*. The grant is made to the attorney “for the use and benefit of —— resident at —— and until (the executor) should apply for and obtain probate: *Cassidy*, 4 Hagg. 360.

Upon the application of the executor for probate, it is usual to file an affidavit of the attorney shewing “that no action at law or suit in equity had been brought by or against him as administrator,” and this being done, the administration is declared to have ceased and expired, and probate is granted to the executor: *Ib.*

On the death of the executor, letters of administration to his attorney cease to have any force, and the administrator cannot

thereafter make a good title to the property of the testator: *Webb v. Kirby*, 7 De. G. & M. 381.

The grant to the attorney does not break the chain of succession, upon the executor's death his executors represent the original testator, for that purpose the proof of the will by the attorney has the same effect as proof by the executor himself: *Murguia*, 9 P.D. 236; *Bayord*, 1 Rob. 768.

A grant of administration with the will annexed has been made to a legatee who had a life interest in the residue, for the use and benefit of the executor till his recovery, he being incapacitated through illness: *Ponsonby*, [1895] P. 287.

In *Hunt*, [1896] P. 288, the grant was to the general manager of an incorporated company as their nominee, they having been appointed executors and trustees.

The English Courts have in some cases refused to grant probate to the executor named in the will of a married woman domiciled abroad, even where her husband consents, but, upon such consent, will make a general grant of administration with the will annexed to the person named as executor by the will: *Vannini*, [1901] P. 330; *Hallyburton*, 1 P. & D. 90; *Trefond*, [1899] P. 247. These were, however, British subjects who had married foreigners and become domiciled abroad, thereby losing their British status; their wills were made in English form, and were valid in England as the exercise of a power of appointment, though perhaps invalid as wills by the law of the domiciles.

It is a fixed principle that a person entitled in a higher capacity will not be appointed personal representative in a lower capacity. One who is entitled to probate as executor will not be allowed to take administration with the will annexed: *Bullock*, 1 Sw. & Tr. 273; *Richardson*, 1 Sw. & Tr. 515; *Morrison*, 2 Sw. & Tr. 129.

The practice of the Ecclesiastical Courts is embodied and continued in the English Probate Rule 50 (1862). "No person who renounces probate of a will or letters of administration of



the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.”

A person entitled to a general grant of administration with the will annexed, cannot take a more limited grant, even though it may seem convenient to do so: *Somerset*, 3 P. & D. 350.

A bond must be given as in the case of an intestacy. Section 57 of the Surrogate Courts Act, 1897, reads:

“Where administration is granted with the will annexed, a bond shall (unless it is otherwise provided by law) be given to the Judge of the Court as in other cases and with like effect, and unless otherwise provided for by this Act of the Rules or orders relating to Surrogate Courts from time to time in force the practice and procedure in respect to such administrations and in respect to such bonds and the assignment thereof shall, so far as the circumstances of the case will admit, be according to the practice in such cases in Her Majesty’s Court of Probate in England, on the 5th day of December, 1859.”

It is provided by section 58 of the said Act that in the case of wills of persons who died before the Devolution of Estates Act came into effect, the administrator with the will annexed must give security with regard to the value or probable value of the real estate devolving upon the personal representative by the terms of the will itself with the power to dispose thereof.

The rule that no grant of administration with the will annexed, shall be made until seven days after the death of the deceased, except upon order of the Judge, continues as a formal rule what was the established practice of the Court before the rule was adopted.

The will must be marked and its execution proved in the same way as upon an application for probate. The affidavit of plight should also be made.

When the grant is made under special circumstances, in pursuance of section 59 to a person who but for that section would not be entitled, the administrator’s oath, the bond, and the letters of administration must plainly make that fact to appear: Rule 13.



## CHAPTER XXI.

### ADMINISTRATION DE BONIS NON.

If executors to whom probate has been granted, die without having fully administered the testator's estate, and without transmitting the chain of executorship, by the appointment by the survivor of them of an executor, representation of the estate of the deceased must be continued by the appointment of an administrator with the will annexed. Such administration deals only with so much of the estate as has not been already administered. The grant is said to be *de bonis non administratis*.

Where an administrator, with or without the will annexed, has died without completing his administration, a like grant is made.

The petition, the administrator's oath, and the grant are qualified to meet the circumstances. The application prays that administration with the will annexed "of all the unadministered property of the said deceased" may be granted and committed to the petitioner.

If an executor dies, after having disposed of a part of the estate before probate has been granted, administration with the will annexed is granted of the whole of the testator's property, and not *de bonis non administratis*: *Wankford v. Wankford*, 1 Salk. 308.

If the surviving executor leave an executor who takes probate of the will of such executor, there will be no administration *de bonis non*, as the latter executor is also executor by transmission of the first testator.

When one executor dies, his surviving co-executors alone represent the estate of the testator. There is, in that case, no transmission of the executorship.

But when the sole or surviving executor dies after probate, intestate, there is also no transmission of the executorship and

no representation of the testator, and so administration of the property of the original testator left unadministered by the executors, is granted.

It may be observed that, to continue the chain of representation, probate of each will that constitutes a link in the chain must be obtained in the courts here. A foreign probate will not continue the representation, as under it the executor has no rights here. The will of a testator was proved in Ireland, but not in England. The will of his executor was proved in both countries, but the executor of the last will did not represent the original testator in England, so as to be entitled as his representative to take administration of the estate of the original testator's wife: *Gaynor*, 1 P. & D. 723; *Twyford v. Trail*, 7 Sim. 32.

The principles governing the selection of the persons entitled to administration *de bonis non*, are the same as in the case of an original grant of administration, it being remembered that one who has renounced probate has wholly ceased to have any right to the representation since the Court of Probate Act, 1857, section 79, section 65 of the Surrogate Courts Act, Ont.

The Court may, however, in a proper case, allow an executor to retract his renunciation, and take probate where probate had issued to another of the executors, but not where administration has been granted: *Stiles*, 1898, P. 13.

The estate of a testatrix having been administered, except as to one legacy, the Court, on motion, granted administration with the will annexed *de bonis non* to the legatees, without requiring the representatives of the executor or of the residuary legatees to be cited, but ordered that the sureties should justify: *King*, 8 P.D. 162.

The grant may be made to a specific legatee, if the residuary legatee residing abroad has no beneficial interest by reason of there being no residue after payment of the debts and specific legacies: as the residuary legatee had notice by letter of the application, he was not requested to be cited: *Wilde*, 13 P.D. 1.

In Ontario by section 41 of the Surrogate Courts Act only those next of kin or kindred of the deceased who reside in the province need be cited.

An administrator *durante minore ætate* is in *loco executoris*, and may be sued as the executor of an executor may: *Anon*, 1 Freem. 288.

A grant of administration with the will annexed *durante minore ætate* had been made to the mother of an infant, who was a legatee of part of the residue. The infant died, and the mother and another infant became entitled to his share of the residue. The administration *durante minore ætate* having ended by the death of the infant, administration *de bonis non* with the will annexed, was committed to the mother: *Akers v. Dupuy*, 1 Hagg. 473.

Where administration has been granted to two and one dies the survivor is sole administrator. An administrator cannot assign his administratorship, it will not go to his executors or administrators but to the surviving administrator: *Eyre v. Shaftesbury*, 2 P. Wms. 121. One administrator stands on the same ground and foundation in regard to releases as one executor, and so also it would seem as to survivorship: *Jacomb v. Harwood*, 2 Ves. Sr. 268.

The office of administrator not descending to his executor, upon the death of all the administrators, administration *de bonis non administratis* must be obtained.

The Ecclesiastical Courts regarded a grant *de bonis non* as within the statutes in the same way as an original grant: *Kindleside v. Cleaver*, 1 Hagg. 345; *Walton v. Jacobson*, 1 Hagg. 346. Consequently, for a long time, upon the death of a husband who was administrator to his wife, the grant *de bonis non* was made to her next of kin, though they had no interest in the estate, the husband's representatives being solely entitled. The rule that the grant should follow the interest is now well established, and in such a case, in England, where the husband inherits all his

wife's personalty, the grant is made to his representatives: *Fielder v. Hanger*, 3 Hagg. 769.

In Ontario the disposition of the property, real and personal, of a married woman is governed by section 5 of the Devolution of Estates Act, and as the person entitled in distribution is preferred to one who has merely a derivative interest, the representatives of the husband would have an inferior claim to the children or other next of kin of the deceased wife: *Kinchella*, [1894] P. 264.

Moreover, the statutes apply in favour of those only who are next of kin *at the time of the death* of the intestate, and not of those who would fill that condition where the second grant is applied for. If those who were next of kin at the time of the intestate's death are dead when the application is made, and there are no special circumstances, the grant is made, in the discretion of the Court, to the person having the largest interest in the estate to be administered: *Savage v. Blythe*, 2 Hagg. App. 150.

In *Savage v. Blythe*, *ante*, administration was originally granted to a brother of the deceased, the other persons entitled being nephews and nieces. Upon the distribution of the estate the administrator took the securities of the deceased for himself, but died without realizing them. His executor was preferred for administration *de bonis non* in priority to the nephews and nieces, because the interest was clearly in him, and the right under the statutes was confined to the next of kin at the time of the death, which the nephews and nieces were not. See also *Almes v. Almes*, 2 Hagg. 155; *Lovegrove v. Lewis*, 2 Hagg. App. 152; *Middleton*, 2 Hagg. 60.

Where administration has been granted to a creditor, upon his death the next of kin may come in and claim the administration *de bonis non*: *Skeffington v. White*, 1 Hagg. 702.

A limited grant *de bonis non* may be made. Administration had been granted to the attorney of the son, one of two children of the intestate, whose death had been presumed. The intestate

and both children belonged to New South Wales. The attorney died leaving the estate partly unadministered. The Court granted administration *de bonis non* to the attorney of the other child, notice having been given to the son. He seems to have assigned his interest in the estate. The grant *de bonis non* to the attorney was limited till the daughter of the intestate came to England and appealed for a grant: *Barton*, 1898, P. 11.

Before 11 Geo. IV. and 1 Wm. IV. ch. 40, if the testator failed to dispose of the residue of his effects, the executor was deemed to be entitled thereto. But by that statute it was enacted that when any person shall die having by will, or codicil, appointed any person to be executor, such executor shall be deemed to be a trustee for the person, if any, who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially. The statute does not affect or prejudice the right of the executor to the residue, in case there is no person who, in case of an intestacy, would be entitled under the Statute of Distributions, R.S.O. ch. 337, sec. 14-15.

Before the passing of the statute, the representative of the executor of a will which did not dispose of the residue, if such executor died leaving goods unadministered, was entitled to administration *de bonis non*, as he was the person having the greatest interest in the administration. That interest, since the statute, could only arise when there are no next of kin, and no disposition has been made of the residue.



## CHAPTER XXII.

### LIMITED AND SPECIAL ADMINISTRATION.

Ordinary probate or administration extends to the whole estate of the deceased, real as well as personal, and is for the lifetime of the grantee. But in special cases it is competent for the Court to grant probate or administration limited, either as to the time of its duration, or the property to which it applies, or both.

Where a general grant of administration is unnecessary, the Court of Probate in this province always exercised the same jurisdiction in granting limited administration, as was possessed by the Ecclesiastical Courts in England, and there is no reason to doubt that this was rightfully done, and the Surrogate Courts have now a like authority: *Re Thorpe*, 15 Gr. 76.

Section 17 of the Surrogate Courts Act continues all authority, voluntary and contentious, in relation to causes and matters testamentary in the Surrogate Courts, and sub-section 3 of section 18 confers the same powers upon the Surrogate Courts as were formerly possessed by the Court of Probate for Upper Canada.

Letters probate are not unfrequently limited by reason of some provision in the will itself.

One may appoint an executor whose executorship begins at a definite time, as five years after the testator's death, or upon the happening of a certain event, as the marriage of his son or of his widow, or upon the death of the previous executor, or he may appoint the executor of some other person still living to be his executor, so that until the death of that other, he has no executor: *Bond v. Faikney*, 2 Cas. temp. Lee, 371.

Then, too, the grant may be limited as to place. The testator may appoint one set of executors whose powers are limited to the property in Portugal, and another set of executors to act generally: *Velho v. Leite*, 2 Sw. & Tr. 456.

The will may limit the powers of executors as to subject-matter, and the grant will be limited accordingly. The testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him: *Dyer*, 4a. The same will may contain the appointment of one executor for general and another for special purposes: *Lynch v. Bellew*, 3 Ph. 424. In such cases the grant is to the general executors named in the said will, with a limited grant to the special executors for the purpose for which they are appointed. The word "general" in such a connection implies that there is, or may be, another executor who is not general: *Re Parker's Trusts* (1894), 1 Ch. 707. In that case the special executors were appointed for the purpose of representing the estate of a former testator of whom the deceased was executor. The grant of probate to the special executors would be limited to that purpose, and would continue the chain of executorship. Separate executors may be appointed for the purpose of carrying into effect the provisions of a codicil, and probate limited to these provisions will be granted to them.

If there are general and special executors, and they apply together, the grant to both is made in the same document, but the powers of each are carefully distinguished. The general executors make oath that they will "faithfully administer the estate of the deceased save and except so far as related to all real and personal property vested in the said testator upon or for the trusts or purposes of the will of (the testator of whom he was executor), and also to exhibit a true and perfect inventory of the said estate "save and except" as before. The oath of the limited executors is qualified in a similar way. They swear to faithfully administer so much of the estate of the deceased as consists of real and personal property vested in the said testator upon or for the trusts or purposes of the will of (the testator of whom he was executor). The grant of probate is qualified in each case in the same way.

If the executors apply singly the grant is limited in each

case. If the general executor apply for a grant before the special executor, the former takes a limited grant, and leave should be reserved to the special executor to come in and take the limited grant to which he is entitled.

Now, however, the English Rule 29 (1862) is that "limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Judge."

Surrogate Court Rule 14 provides that "where limited administrations are applied for, it must be made to appear that every person entitled in distribution to the property has consented, or renounced, or has been cited and failed to appear, except when the Judge has seen fit otherwise specially to direct."

No person entitled to take a general grant can be allowed to take a limited grant, except grants for personal estate only under section 61 of the Surrogate Courts Act.

A mandamus may be granted to compel the grant of administration generally to the person having the statutory right thereto, but a limited administration not being within the statutes, the Court has a discretion as to who shall have the grant, and a mandamus will be refused: *Rex v. Bettesworth*, 1 Barnard. 370. There the unsuccessful application was to compel a grant of administration during the minority of the applicant's two infant grandchildren. The Court determined that, the grant being in the discretion of the Judge, he might insist upon reasonable or equitable terms, or refuse the grant of administration to the claimant.

Probate of a lost will, when granted, is limited until the original will or an authentic copy is proved: *Sugden v. Lord St. Leonards*, 1 P.D. 154.

Where a will and codicil have been in existence and the will is revoked, it must be shewn by the party applying for the codicil alone that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that as

the will is destroyed, the codicil is also revoked: *Grimwood v. Cozens*, 2 Sw. & Tr. 368. But if such a codicil is perfectly independent of the will, and was intended to operate separately from it, administration with the codicil annexed will be granted, limited until the will is found: *Greig*, 1 P. & D. 72.

If the original will is in the possession of a person resident abroad, who refuses to give it up, probate of a copy, duly verified, may be granted, limited until the original will is brought within the jurisdiction.

If the administrator from some circumstance cannot swear that there is no will, because he has reason to think that there is a will, which cannot be found, and the contents of which he cannot prove, he may have a grant of administration, limited until the original will, or a copy, be brought in.

In all grants of a limited or special character, the recitals in the oath and in the letters of administration, as well as in the bond, must be framed in accordance with the facts of the case: See Rule 16.

## CHAPTER XXIII.

### ADMINISTRATION AD COLLIGENDA AND JUS HABENTUM.

It sometimes occurs that the delay necessary before the person who is entitled to probate or administration could apply, may endanger the estate. In such case the Court need not wait for the application of such person, but may grant letters of administration *ad colligenda bona*.

In *Metcalf*, 1 Add. 343, the testator stated that he had made his will and left it in India. As no suit was pending, administration *pendente lite* was out of the question; there could not be administration *durante minore ætate* of the executor, or *durante absentia*, for it was not even known who the executor was, but administration was necessary to get in and manage the property until the will should arrive. Administration was granted, "limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India Bill, and for otherwise protecting the property of the deceased," "until the last will and testament of the deceased, or an authentic copy thereof, should be transmitted to this country."

At one time an executor might appear upon citation or voluntarily, and crave time to decide whether he will act, and a grant might be made *ad colligendum* in the interval.

A grant has been made, "limited to the collection of all the personal property of the deceased, and giving discharges for all the debts which might be due the deceased's estate, on payment of the same; and doing what further might be necessary for the preservation of the property aforesaid; and to the safekeeping of the same to abide the direction of the Court": *Mary Radnall*, 2 Add. 233.



In another case it was "limited to the collection of the personal estate of the deceased, with a power to the administrator to give discharges for his debts on the payment of the same, and to renew the lease": *Clarkington*, 2 Sw. & Tr. 382.

Administration was granted in a similar way to the friend of a foreigner who had died in London possessed of certain English bills of exchange: the friend had procured the acceptance of these bills, and had paid necessary expenses. The grant was "limited to the sums due and to become due on the bills of exchange; and, after the administrator should have reimbursed himself, the money which he had expended on behalf of the deceased, and also the expenses of the application to the Court, to invest the balance in his own name in government securities, and to keep it so invested until a general representation shall be effected to the deceased: *Don Miguel Gudolle*, 3 Sw. & Tr. 222.

The stock of an insolvent timber merchant was subject to charges and liable to deteriorate in value if held, and debts owing to him were likely to be lost if not promptly collected. The widow and children renounced. The Court made a grant *ad colligenda bona*, to a creditor, and directed him, after paying necessary charges to deposit the residue in the Registry until a general grant should be made. The next of kin abroad were to be cited at once so that a creditor's grant might be made as soon as possible: *Stewart*, 1 P. & D. 727. In Ontario this would have been unnecessary, as by section 41 of the Surrogate Courts Act, only the next of kin within the province need be cited: *Carr v. O'Rourke*, 3 O.L.R. 632.

Where it is for the benefit of absent or unknown next of kin, the Court will empower the administrator *ad colligenda bona*, to dispose of the property or any portion of it by sale. In *Schwerdtfeger*, 1 P.D. 424, the deceased was a Prussian bachelor school-master who had resided for seventeen years in England. There was an offer for the goodwill of his school provided immediate possession could be given, and if there was any considerable delay, the depreciation would be serious. The order appointing

an administrator *ad colligenda bona* was made to a creditor, "limited to the collection of all the personal property of the said deceased, and giving discharges for all debts which might be owing to his estate on payment of the same, and disposing of the goodwill of his business or occupation of a schoolmaster, and doing further what may be necessary for the protection of the property aforesaid, and to the safekeeping of the same to abide the direction of the Court." The administrator was further ordered to pay into the Registry of the Probate Division of the Court the balance in hand after the expenses of such sale, and the costs of obtaining letters of administration after the taxation thereof.

The oath of the administrator would be qualified so as to limit his duties and obligations as set out by the order.

The next of kin of a small shopkeeper, who had resided in London, and died there a bachelor and intestate, lived in South America. He had been communicated with, but no answer had yet been received. It was necessary to sell the goodwill and business to prevent great loss. A friend of the deceased who had been asked by the intestate shortly before his death to manage his affairs, was appointed administrator, *ad colligendum*: *Bolton* (1899), P. 186. In *Suarez* (1897), P. 82, the next of kin were in the interior of Bolivia, where a telegram took six weeks to reach them. Large quantities of goods were lying at Liverpool consigned to the intestate, and as bills were falling due almost daily, it was necessary to wind up the business promptly. An accountant with whom the deceased's books were left, was given a general grant of administration, "limited until such time as the proper person shall apply to take a full grant of administration."

A woman having died intestate without any known relatives, and it being impossible to learn whether she was ever married, or if married, whether her husband survived her, a grant *ad colligendum* was made to a creditor, with liberty to him to pay arrears of rent, a mortgage on the goods, and parochial rates, and to pay and discharge the servants: *Ashley*, 15 P.D. 120.

Where the *jus habens* is incompetent by reason of lunacy, ill health, and the like, administration will be granted for his use and benefit during his incapacity.

If a sole executor be a lunatic, administration with the will annexed will be granted to his committee for his use and benefit until he shall become of sound mind: *Phillips*, 2 Add. 336(u).

If two persons compose the committee, both must take, or one may renounce. The production of the order making the appointment of the committee is evidence both of the status of the committee and of the lunacy.

If there is no committee, a grant will be made to the residuary legatee or devisee named in the will, for the use and benefit of the lunatic, and limited to the period of his incapacity.

Where the lunatic has not been so declared by some order or other judicial finding, evidence of the lunacy must be furnished by affidavit.

Where one executor is a lunatic and the other is abroad, the grant of administration with the will annexed is made to the attorney of the absent executor, until he personally applies for probate or the lunatic recovers and applies.

“The practice as to administration where a grant has been made to a next of kin, and such next of kin becomes insane, appears to be as follows” :—

“Firstly, where such a lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic, so long as he shall remain a lunatic. The first grant is not in such case impounded.”

“Secondly, where the lunatic is not so found by inquisition, but, under section 116 of the Act of 1890, a person has been appointed with general authority over the lunatic’s property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic’s estate.”

“Thirdly, if a person appointed under section 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant.”

“Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next of kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded. There is authority for the practice in the case of *In the Goods of Binckes*, 1 Curt. 286.”

“Fifthly, I am informed that it has not hitherto been the practice to inquire whether the lunatic is likely to recover, and in the event of its appearing that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next of kin. There appears to me to be good reason for this. It must always be doubtful, and often highly doubtful, whether an insane person is or is not likely to recover, and the inquiry whether he be likely to recover may be one attended with considerable difficulty and expense. Nor can I see any practical objection to the grant being limited to the use of the lunatic so long as he remains such”: *Cooke*, [1895] P. 68.

The grant in that case was made to the next of kin of the intestate, limited to the period of lunacy of the present administrator, and the grant of administration to the lunatic was ordered to be impounded.

Grants “save and except” are made when some particular part of the estate is not to come within the grant; for example, if an executor make a will appointing an executor to administer an estate vested in himself as executor, and dies intestate as to his own estate, administration of his own estate will be granted to his next of kin “save and except” what the testator has himself excepted, without waiting for the executor to take the limited probate to which alone he is in that case entitled.

Where the directions of the will are such as to give the general management of the estate to the executors, and appoints masters or other executors for a special purpose, probate is granted to the general executors save and except the special purposes.

The probate or administration following upon a limited grant is said to be *cæterorum*, and except that it follows, instead of preceding, the limited grant, it is made for the same purposes and under the same conditions as the grant "save and except."

The use of the terms is illustrated in the case of *Rhoades*, 1 P. & D. 119. A bastard had given certain legacies by her will, but did not dispose of the residue. The executors were both dead, and there were no next of kin. The Crown was entitled to a grant save and except what belonged to the legatees, or to a *cæterorum* grant, after a grant had been made to the legatees limited to what they took under the will, but not to a general grant.



## CHAPTER XXIV.

### ADMINISTRATION DURANTE ABSENTIA.

Where one or more persons who have a right to administration, or a beneficial interest in the estate of the testator or intestate, are precluded from personally acting, by residence out of the jurisdiction of the Court, by their own minority, or by their lunacy or imbecility, the Court will make a grant to another person for the use and benefit *habentium jus seu interesse*, but will limit in duration to such a period and to such an extent as the circumstances of the case demand: Tristram & Coote's Probate Practice, 13th ed., p. 121.

All these temporary administrations, though out of the Statutes of Edw. III. and Hen. VIII., are yet allowed to be within the equity of those statutes for the ease and convenience of the subject: 2 P. Wms. 590.

The English Rule 32 (1862) provides that "in the case of a person residing out of England, administration or administration with the will annexed, may be granted to his attorney acting under a power of attorney."

The provision of the Surrogate Courts Act, secs. 41 and 42, are considerably more narrow. The latter section reads:—

"If the next of kin, *usually residing in Ontario* and regularly entitled to administer, happen to be abroad from Ontario, the Surrogate Court having jurisdiction in the matter may, in its discretion, grant a temporary administration, and appoint the applicant or such other person as the Court thinks fit, to be administrator of the property of the deceased person for a limited time, or to be revoked upon the return of such next of kin as aforesaid."

By section 41 it is enacted that where the application for administration is made by a person not entitled to the same as

next of kin to the deceased, the next of kin or others having or pretending interest in the property of the deceased *resident in Ontario*, shall be cited or summoned to see the proceedings, and to shew cause why the administration should not be granted to the person applying therefor, and if neither the next of kin nor any person of the kindred of the deceased happens to reside in Ontario, then the citation or summons is to be served as directed by the rules or orders in that behalf.

Those of the next of kin resident in Ontario are the only persons who are entitled to citation upon an application for administration: *Carr v. O'Rourke*, 3 O.L.R. 632.

The grant *durante absentia* made to the attorney of the executor or executors, is administration with the will annexed, and is made to the attorney for the use and benefit of the executor or executors, and limited until he or they shall apply for and receive probate. The grant by these words only expresses that the administrator is the agent of the person employing him. The grant is substantially for the use and benefit of all persons having beneficial interest in the estate: *Chambers v. Bicknell*, 2 Hare 536.

The limitation as settled in *Cassidy*, 4 Hagg. 360, reads, "for the use and benefit of . . . resident at . . . and until the executor (or the party entitled to the administration) should duly apply for and obtain probate or administration."

## CHAPTER XXV.

### ADMINISTRATION DURANTE MINORE AETATE.

If the sole executor or the person entitled by statute to administer is a minor, administration may be granted limited until the minor attains his majority. This is called administration *durante minore ætate*. If there be a will, it is an administration with the will annexed.

If there are two executors, one of whom is of full age, he may have probate, leave being reserved in the grant to the minor to come in and take probate when he attains his majority.

Where there is an intestacy, this species of administration has been held not to be within the Statute of 21 Hen. VIII. ch. 5, and the Court has, therefore, a discretion to grant it to such person as it may think fit: *West v. Willby*, 3 Phillim. 379; 1 Vent. 219, *per* Hale, C.J. So in *Cartright's Case*, 1 Freem. 258, the contest was between an adult grandchild of the intestate, and the mother of three other grandchildren who were minors, she being their guardian. The grant was made to the mother, the interest of the three being greater than the interest of the one.

The Statute 12 Car. II. ch. 24, sec. 8, gives the father of unmarried children under the age of twenty-one years, whether born or in *ventre sa mère*, and whether the father be himself of full age or not, the power by deed or will in writing to dispose of the custody and tuition of such child, during his minority, and gives the guardian an action for the custody of such child, and an action for damages for taking him away or detaining him: R.S.O. ch. 340, sec. 2.

The mother of an infant may, also, by deed or will, appoint a guardian of her unmarried infant children after the death of herself and the father, and where both parents appoint guardians they are to act jointly: R.S.O. ch. 168, sec. 15.

It has been held that the testamentary guardian of minor children is entitled to a grant of the administration for their use and benefit in preference to the guardian elected by the children: *Morris*, 2 Sw. & Tr. 360.

Surrogate Court Rule 17 provides that "grants of administration may be made to the guardians of infants and minors, for the use and benefit of such infants and minors during their minority; and elections by minors of their next of kin, or next friend as the case may be, to such guardianship, shall be required when the infant is fourteen years of age and over."

It may be noted that a will merely appointing a testamentary guardian does not require probate: *Gilliat v. Gilliat*, 3 Phillim. 222. But see R.S.O. ch. 168, sec. 9, sub-sec. 1.

Under section 9 of 12 Car. II. ch. 24, testamentary guardians had the profits of the child's lands for the use of the child, also the custody and tuition of the child, and the management of his personal estate until his majority or such earlier time as the instrument creating the guardianship shall fix. The guardian has also the right of action in relation to the ward's property: R.S.O. ch. 340, sec. 3.

Apart from the statutory rights conferred upon testamentary guardians, the Court exercises its discretion in making the grant, and the guardian approved by the minors has been refused the grant of administration and it has been made to another. Thus in *Lovell v. Cox*, cited in *West v. Willby*, 3 Phillim. 379, the grant was refused to the father of the infant executrix and residuary legatee, and granted to the trustees appointed by the will, in the exercise of the discretionary power vested in the Court. The grant may be made to creditors, if the estate is insufficient to pay the debts, in preference to the guardian: *West v. Willby*. The grandfather who was next of kin, but was advanced in years, was passed over in favour of an uncle: *Ewing*, 1 Hagg. 381.

In *Havers v. Havers*, 2 Barnadeston C.C. 22, it was determined in the Court of Chancery that an administration *durante*

*minore ætate* should not have been committed to one who is very poor, though she is guardian and next of kin to the infant. The security that was given by the administratrix was insufficient, and the Court of Chancery appointed a receiver of the infant's estates. Lord Hardwicke said of the administratrix: "She appears to be very poor, and on that account was very unfit to have been intrusted by the Ecclesiastical Court with the administration during the minority of the infant." The suit begun by the administratrix to get in the estate were directed to be continued by the receiver.

It would seem to be the law now that administration will not be granted to an infant foreigner, even though by the law of the domicile of the deceased he would be entitled. He could not give a proper bond: *Orleans*, 1 Sw. & Tr. 253. But in an earlier case such a grant was made: *Da Cunha*, 1 Hagg. 237.

In the case of a sole infant executor the right of the guardian of the infant to administration is subject to the discretion of the Court, and the grant may be made either "to the guardian of such infant, or to such other person as the Surrogate Judge shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him:" 38 Geo. III. ch. 87, sec. 6; R.S.O. 1897, ch. 337, sec. 3. Section 7 of the same Act vests the same powers in such an administrator "as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin."

Before this Act was passed it was the practice to regard a grant during the minority of an infant executor as ceasing when the infant executor reached the age of seventeen years, at which age he was deemed capable of taking the executorship. The grant *durante minore ætate* of the next of kin continued until the next of kin was twenty-one.

It seems to be established that if administration be granted during the minority of several infants, it ends when one of



them comes of age, and he may then prove the will or take administration as the case may be.

The marriage of one of the infants to a husband of full age does not end such an administration: *Jones v. Earl of Strafford*, 3 P. Wms. 88, overruling *Prince's Case*, 5 Co. 296. Nor will the death of one of the infants "determine the administration, for the living infants would not be of age, and the other dying during his infancy, and not being *in esse* would be as out of the case:" *Ib.*, p. 89.

In *Prince's Case*, *ante*, and in some other early cases, it was questioned whether the powers of an administrator *durante minore ætate* were not limited. The point was raised before Jessel, M.R., in *In re Cope*, 16 Ch. D., who said: "The question in this case is raised by reason of some obscure dicta in some musty old law books about the power of an administrator *durante minore ætate*. The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him." He treats the question as to whether the sale is beneficial as wholly irrelevant.

Such an administrator may exercise a power of sale given by the will to the executors or administrators: *Mansell v. Armstrong*, L.R. 14 Eq. 423, in which Lord Romilly, M.R., says: "I can find no distinction between a common administrator and an administrator *durante minore ætate* as regards the exercise of a power of sale."

It would seem, too, that he may assent to a legacy, and he may be sued for the debts of the deceased.

If an action against him as administrator is pending when the administration is ended, he ought to retain assets to satisfy the debt which attached on him by the action: *Sparkes v. Crofts*, Comb. 465.

The person entitled to a grant on behalf of a minor is his

father. But if the minor is of the age of fourteen the consent of the minor must be obtained.

If the father be dead precedence is given to the guardian appointed by the father under 12 Car. II. ch. 24, either alone or jointly with the mother.

The mother is by statute the guardian, either alone in case the father has appointed no guardian, or jointly with such guardian if appointed by the father.

Failing such guardians, the guardian of the estate of a minor appointed by the High Court, comes next in order.

The production of the deed or will appointing a testamentary guardian is necessary.

The language of 12 Car. II. ch. 24, is very wide. It gives the father power to dispose of the custody and tuition of his child during its minority as he thinks fit. He may therefore give authority by will to a surviving guardian to appoint a person in place of one who has died: *Parnell*, 2 P. & D. 379.

In *Pitt v. Pitt*, an unreported case decided in 1729, cited in Tristram & Coote's Probate Practice, the minor having elected another guardian, Dr. Bettesworth said that he could not look upon himself as at liberty to approve any other choice than the testamentary guardian.

The authority of a minor to elect a guardian is subject to his having no statutory or other lawful guardian.

In all cases of difficulty owing to special circumstances, if there is an intestacy, or if no executor willing and competent to take probate has been appointed by the testator, or if the executor was resident out of Ontario at the time of the testator's decease, the Court has discretion under section 73 of the Court of Probate Act, section 59 of the Surrogate Courts Act, Ont., to grant administration to such person as the Court thinks fit, and with such limitations as the Court thinks fit. Such security, if any, as the Court directs must be given by the administrator.

## CHAPTER XXVI.

### CESSATE GRANTS.

When an original grant is limited for a specified time or until the happening of a named event or contingency, upon the expiration of the time or the happening of the event, the original grant expires and a second or supplemental grant is applied for. This is commonly called a cessate grant, and seems to be a species of grant *de bonis non*, but it is distinguished from the grant *de bonis non* by being in form a regrant of the whole of the deceased person's estate, though the practice is to set out in the petition and affidavit of value for the cessate grant only so much of the estate as remains unadministered, and the bond, if the grant is one of administration, is settled on the same basis. The following are examples of cessate grants.

By a will the testator's wife was executrix for her life, and upon her death two others were to be substituted, by the will, as executors. Upon her death a grant was made to the two executors: *Foster*, 2 P. & D. 304.

So if one is appointed executrix during her widowhood, upon her re-marriage the grant ceases, and another is made to the executor substituted, merely reciting that the former grant had ceased and expired by reason of the widow's re-marriage.

If a grant has been made until the recovery of a lunatic executor, for his use and benefit, he may on his recovery take probate of the will.

A grant made to an attorney of an executor ceases upon the executor applying for and taking probate of the will, or when the attorney dies.

On the death of an attorney of one of the next of kin, administration will be granted to the attorney of another of the next

of kin, upon notice to the person whose attorney had the former grant: *Barber* (1898), P. 11.

So, too, if probate has been granted of the substance of a last will, or of a copy, it ceases when the will or a more authentic copy is brought in and proved.

## CHAPTER XXVII.

### ADMINISTRATION PENDENTE LITE.

Section 56 of the Surrogate Courts Act, 1897, is the enactment in Ontario of section 70 of the Court of Probate Act, 1857, (Imp.), with some slight changes. It reads:—

“Pending an action touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Court in which an action is pending [Court of Probate] may appoint an administrator of the property [personal estate] of the deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of the property; and every such administrator shall be subject to the immediate control of the Court and act under its direction; and the Court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the Court thinks fit.”

The word “property” has since the Devolution of Estates Act been substituted in Ontario for the “personal estate” of the English Act and the last clause, which refers to the remuneration of the administrator, is substantially section 72 of the English Act. For “Court of Probate” in the English Act, the Ontario Statute has “the court in which an action is pending.”

The Court has power under this section to appoint an administrator *pendente lite* in contested testamentary suits, at the instance of a person who is not a party to the suit, and will do so at the instance of a creditor in order to have the debts paid. The Court of Chancery having appointed a receiver, the grant was made to him: *Tichborne v. Tichborne*, 1 P. & D. 730; *Evans*, 15 P.D. 215.



There is this difference to be noted between the English Statute and its Ontario counterpart. If the action is pending in any court, the Court of Probate may make the grant. The Court *in which an action is pending*, is the only one having jurisdiction in Ontario. The power to make the appointment may be exercised by the High Court of Justice when the litigation is pending in that court. "The alteration introduced into our statute has the effect of giving the jurisdiction to the Court in which the validity of a will is being questioned. It is possible that the intention of the Legislature may have been to vest this power in the Surrogate Court, to which the grant of probate or letters of administration properly belonged. It may have been that for the moment it was forgotten that the validity of a will might be contested elsewhere than in a Surrogate Court. But whatever the origin of this departure from the exact language of the English clause, there is no room for doubt as to its interpretation. Clearly it gives the Court of Chancery power to appoint, where it is exercising its statutory jurisdiction of trying the validity of a will: *Beatty v. Haldan*, 4 A.R., at p. 245, *per Moss*, C.J.A.

Since the decision in *Walker v. Wollaston*, 2 P. Wms. 576, in 1731, it was the custom of the Spiritual Courts to grant administration *pendente lite* as well when the controversy concerned a will as when it related to an intestacy. The right to make the grant in the case of an intestacy seems never to have been in question.

In all cases of such appointment security is required: Surrogate Court Rule 35; *Stanley v. Bernes*, 1 Hagg. 221.

The practice is to appoint an administrator *pendente lite* in all cases in which the Court of Chancery would have appointed a receiver: *Bellew v. Bellew*, 34 L.J. P. & M. 125.

Such administrators are the appointees of the court, and not the mere nominees of the parties: *Stanley v. Bernes*, 1 Hagg. 221.

A person who is neutral between the litigants is preferred for the office: *Young v. Brown*, 1 Hagg. 54.

The Court must, before the making the appointment, be satisfied of the necessity of the appointment, and the fitness of the person proposed: *Ib.*

A party unconnected with the suit is the most proper person to be appointed: *De Chatelain v. Pontigny*, 1 Sw. & Tr. 34; and the rule is that a party to the suit is never appointed unless all parties consent: *Tristram & Coote*, 13 ed., p. 496.

The Court will not appoint an administrator *pendente lite* to receive the share of the deceased in a partnership which is being carried on by the surviving partner, unless a strong case is made against him of the destruction of the property. If such an administrator were appointed, there would be nothing for him to lay his hands upon until an account of the estate had been taken in Chancery: *Horrell v. Witts*, 1 P. & D. 103.

Nor will the appointment be made where the litigation concerns only the validity of a codicil, the validity of the will, which appointed executors, not being disputed: *Mortimer v. Paull*, 2 P. & D. 85.

A suit was instituted in the Probate Court to contest the validity of the will of the deceased, the will was upheld, and probate was granted to the executors, but an appeal was taken from the Court of Probate to the House of Lords. In proceedings before it, while the appeal was pending, the Court of Chancery decided that owing to the litigation still pending over the validity of the will, the executors could not make such a title to certain leaseholds sold by them, as the purchaser could be forced to accept. The Court of Probate ordered the letters probate to be brought into the registry, and a grant of administration *pendente lite* to be made to the executors: *Wright v. Rogers*, 2 P. & D. 179.

The practice in England, under section 7 of the Court of Probate Act, is to appoint, as receiver of the real estate, either the administrator *pendente lite*, or some other person, when the validity of the will is in question. The Ontario Act makes no

distinction in this respect between realty and personalty. The power to appoint a receiver under the narrow words of section 7, is restricted to litigation as to the validity of a will affecting the real estate: *Grant v. Grant*, 1 P. & D. 654.

A wife who was executrix and universal legatee of her husband's will survived him, but did not take probate, and failed to re-execute her own will made in her husband's lifetime. Litigation having arisen as to whether the wife's executors were entitled to a general or limited grant, and it being necessary to give up a lease, to sell furniture, receive dividends and pay debts, administration *pendente lite* was granted to a person to be selected by the Registrar, not only to the estate of the wife, but also to that of the husband: *Dawes*, 2 P. & D. 147. This case was doubted, but followed, in *Fawcett*, 14 P.D. 152.

Before the statute enlarged the character of the grant, the administrator *pendente lite* had power to collect effects, but he had no power to distribute them: *Goodrich v. Jones*, 2 Curt. 457. He might bring actions to collect debts: *Walker v. Wollaston*, 2 P. Wms. 576, and to bring ejectments as to leaseholds: *Wills v. Rich*, 2 Alk. 256. By the statute he has all the rights and power of a general administrator, except the right to distribute the residue.

The duties of an administrator and receiver *pendente lite* commence from the date of the order making the appointment, and continue until the litigation is disposed of upon appeal: *Taylor v. Taylor*, 6 P.D. 29. But they terminate with the decree in favour of the will, whether there are or are not executors, and do not continue until probate is granted: *Wieland v. Bird*, [1894] P. 262. But though the functions of the administrator *pendente lite* terminate with the *lis* he may in some cases be right in retaining moneys received by him until his accounts are brought in and passed. *Ib.*

In *Graves*, 1 Hagg., it is laid down that an administrator

*pendente lite*, is merely an officer of the Court, and holds the property only until the suit terminates; as soon as it is concluded he must pay over all that he has received in his character of administrator to the persons pronounced by the Court to be entitled to it: *Charlton v. Hindmarsh*, 1 Sw. & Tr. 519. In that case the security required was the amount of one year's income.

The powers of a general administrator are vested by the statute in the administrator *pendente lite*, appointed by the Court of Chancery, in which court a suit was pending as to the validity of the testator's will. Such an administrator has, therefore, power to sue without leave of the Court which appointed him, so long as the suits in reference to which he was appointed, are still pending: *Haldan v. Smith*, 25 U.C.C.P. 349.

In *Harver v. Harver*, 14 P.D. 81, the plaintiff and the defendant each claimed to be the testator's widow. The plaintiff propounded a will which the defendant contested. An intervener propounded a later will, in which he was named executor. The administrator *pendente lite* was allowed to pay the premium on the bond of a guarantee society as security, out of the estate, on the undertaking of the intervener to repay the amount if he should fail to establish the later will, and be condemned to pay the costs.

It was, at one time, the practice in Chancery to entertain a bill for the preservation of the estate, when litigation was pending in the Ecclesiastical Courts for probate or administration, and to appoint a receiver of the property, notwithstanding the fact that the Ecclesiastical Courts might have appointed an administrator *pendente lite* to get in the effects: *Watkins v. Brent*, 1 Myl. & Cr. 102. Such a suit need not be brought to a hearing, as its purpose was gained by the appointment of the receiver; and it could not be dismissed for want of prosecution, but when the litigation in the Ecclesiastical Court was ended, the costs were disposed of in the same way as in the litigation in the Ecclesiastical Court: *Barton v. Rock*, 22 Beav. 81.

Though the jurisdiction to appoint a receiver remains, the High Court would not now appoint a receiver, but would leave the Surrogate Court in which the action was pending, to appoint an administrator *pendente lite*: *Veret v. Duprez*, L.R. 6 Eq. 329; *Hitchen v. Birks*, L.R. 10 Eq. 471. See also *Tichborne v. Tichborne*, 1 P. & D. 730, from which it appears that the Court of Chancery had the same jurisdiction over an administrator *pendente lite* as over an ordinary administrator, and would maintain a bill filed against an administrator *pendente lite* appointed by another Court, and he may be made to account to those entitled to the estate: *Beatty v. Haldan*, 4 A.R. 239.



## CHAPTER XXVIII.

### ADMINISTRATION AD LITEM.

In addition to the provisions of section 56 of the Surrogate Courts Act for the appointment of an administrator *pendente lite*, Consolidated Rule 194 enables the Court, where an action or proceeding is pending concerning questions in which the deceased was in his lifetime interested, to overcome the absence of a personal representative, either by appointing some person to represent the estate or by proceeding in the absence of representation.

Whichever course is adopted, the estate is as fully bound as if there were a personal representative, and he had appeared in the action. The Rule is very fully annotated in Holmsted & Langton's Judicature Act.

The scope of the rule is narrow. It does not relate to the administration of the estate of the deceased as that is not a "matter in question" in which he was interested: *Hughes v. Hughes*, 6 A.R. 373.

It must appear on the face of the order, to render it binding on the estate of a deceased person, either that the Court, having had its attention called to the absence of a legal personal representative of the deceased, has dispensed with such representation, or has appointed some person to represent the estate. The fact that the Court proceeded without a legal personal representative is not sufficient to bind the estate: *Re Richardson*, (1893), 3 Ch. 146. It is, in the language of the rule, "the order so made and any orders consequent thereon" that are binding. See also *Mohamidu v. Pilchey* (1894), A.C. 443.

The appointment may be made in Chambers, *ex parte*; at the trial of the action; on a motion for judgment; or where the party interested whose estate is to be represented, dies after the trial, it may be made after trial: *McCarthy v. Arbuckle*, 31 U.C.C.P. 48.

Notice may have to be given to the person entitled to administration: *Curtins v. Caledonia Fire and Life Insurance Co.*, 19 Ch.D. 534.

The Ontario rule is much wider in its scope than the corresponding English rule.

When probate of the will of a deceased person, or letters of administration to his estate, have not been granted, and representation of such estate is required *in any action or proceeding in the High Court*, the Court may appoint some person administrator *ad litem*: Consolidated Rule 195.

An administrator *pendente lite* represents the estate as fully as a general administrator while his office continues, except as to distribution. The administrator *ad litem* represents the estate of the deceased only for the action or proceeding in which he is appointed.

The former Rule 311, for which Rule 195 is substituted, was much wider in its terms, and provided for the appointment of either a general administrator or an administrator *ad litem*.

It was not intended by the rule that the business of the Surrogate Court should in a large measure be transferred to or done in the High Court. The intention was, to provide for necessities arising in the progress of an action, that is to say, where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the party who may require the appointment made under the provisions of the rule. Its provisions cannot properly be applied to a case in which the party seeking to avail himself of them was aware from an early period that he would require such representation and is merely trying to avoid the trouble or expense of an application to the Surrogate Court: *Meir v. Wilson*, 13 P. R. 33.

In *Re Chambliss and Canada Life Assurance Company*, 12 P.R. 649, an administrator *ad litem* was appointed to represent the estate of a deceased mortgagor in a mortgage action which it was intended to commence for the sale of the mortgaged land,

and for the recovery of the deficiency, if any, after sale, out of the mortgagor's estate. The order did not direct a general administration. The form of order made is given in the report of the case.

In *Cameron v. Phillips*, 13 P.R. 78, the mortgagor was dead, he left no estate, and the mortgaged premises were not equal in value to the mortgage debt. An administrator *ad litem* was appointed in the foreclosure action brought on the mortgage. In this case, as also in the last, security was dispensed with.

Notices of all appointments of administrators made *pendente lite* or *ad litem* by the High Court are to be noted by the Surrogate Clerk in the Application Book. Section 47 of the Surrogate Courts Act.

The Surrogate Clerk is, by virtue of section 8 of the Act, an officer of the High Court, and is required to discharge such duties as that Court may require of him.

A copy of every order appointing an administrator *pendente lite* should therefore be filed with the Surrogate Clerk. It should contain all the particulars required by section 44 of the Act and by Rule 48 to be entered in his books. The rule requires the christian and surname, residence and addition of applicant, nature of application and court in which made: *Cameron v. Phillips*, 13 P.R. 141. The grant should shew, if such is the fact, that it is of both the real and personal estate: *Ib.*

In *Ford's Landed Banking and Loan Co.*, 13 P.R. 210, a Divisional Court refused to appoint an administrator *ad litem* under the rule, 311. The action was to recover a sum of money deposited, partly by the plaintiff and partly by her husband, since deceased, in the name of a non-existent person. The application was to appoint an administrator *ad litem* to represent the deceased husband in the action.

In *Cameron v. Phillips*, 13 P.R. 141, the form of the order was discussed. It was said that the order should give all the particulars required by Rule 48 of the Surrogate Court to be given to the Surrogate Clerk. Upon the consent and renuncia-

tion of the executor appointed by the will of the deceased mortgagor, the action being for foreclosure, and there being no assets but the mortgaged land, which was of less value than the debt, such executor was appointed administrator *ad litem*.

In that case the action was begun before the motion was made. In *Re Williams and McKinnon*, 13 P.R. 338, by Rule 311, it was held to be competent for the Court to limit such a grant to the real estate in question in the action; and also that the appointment may properly be made before the action is brought.

The consent of the person to be appointed must be shewn: *Ib.*

In *Re Tobin*, 6 P.R. 40, an order for the administration of an estate had been made by the Court of Chancery. The accounts were taken and the Master had made his report, but before it was confirmed the administratrix died. The estate was insolvent, and no person would administer. An administrator *ad litem* was appointed to represent the estate; but the appointment was perhaps made rather under what is now Rule 194, than under Rule 195.

An administrator *ad litem* has no power to bring an action relating to the testator's estate, as for example to set aside a tax sale: *Rodger v. Moran*, 28 O.R. 275.

An administrator *ad litem* will not be appointed in an action for malicious prosecution, to represent the estate of a defendant who dies after the action is begun, but before trial; though, by virtue of R.S.O. 1897, ch. 129, sec. 11, the action subsists against the executors or administrators of the deceased where the latter committed a wrong against the or property of the plaintiff, the administrator in that section is a general administrator having full power of administering the assets of the deceased person: *Hunter v. Boyd*, 3 O.L.R. 183.

In that case the principles which guide the Court in appointing administrators under Con. Rules 194 and 195 were discussed.

“There is abundant authority for holding that the powers conferred upon the High Court by Rules 194 and 195 should be used in cases of necessity only, and that the circumstances of



each case in which the application is made are to be examined for the purpose of satisfying the Court that the case is a proper one for the exercise of the discretion given it of acting upon the rules: *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294; *Hughes v. Hughes* (1881), 6 A.R. 373; *Rodger v. Moran* (1896), 28 O. R. 275; Daniell's Chy. Prac., 6th ed., p. 208, and the cases there cited."

The effect of a judgment against a defendant appointed under these rules, "is merely to establish the right of the plaintiff against the estate without enabling him to enforce his right until a general representative is appointed. This limited effect of a judgment obtained by a plaintiff against an administrator *ad litem* indicates to some extent the cases to which appointments under the rules should be limited. Where the object is merely to make the record complete and an estate to which no executor or administrator has been regularly appointed is a necessary party for the purpose without having any substantial interest in the result, either by reason of insolvency or otherwise, the rules seem of safe and proper application. But when the object of the action is directly to recover a judgment against an estate which is not a necessary party to the action, there the Court may properly, under ordinary circumstances refuse to make an order under these rules for the reason that a judgment against the limited administrator, being in fact merely declaratory of the plaintiff's rights against the estate and not enforceable against it until a proper administrator is appointed, the plaintiff may as well wait for a proper administrator before proceeding at all against the estate."

In *Fairfield v. Ross*, 4 O.L.R. 534, an application by the plaintiff to appoint him as administrator or administrator *ad litem*, in an action to set aside a bill of sale made by the deceased as fraudulent and obtained by undue influence, was refused, as the object was to get in substantially the whole estate, and the application was not within the purview of the rules, as it involved general administration.



## CHAPTER XXIX.

### ALTERATIONS IN GRANTS.

The Ecclesiastical Courts had the power to make alterations in grants for the purpose of correcting errors and rectifying mistakes.

The 17th section of the Court of Probate Act, 1858, gave the Court of Probate the same power to alter and amend grants made by the Ecclesiastical Courts before the Court of Probate was established, as the Ecclesiastical Courts formerly had. The powers of the Ecclesiastical Courts were continued in the Court of Probate, and, since the Judicature Act, in the Probate Division.

The powers conferred on the Surrogate Courts of Ontario by the Surrogate Courts Act, are equally extensive.

The errors to be rectified are of various kinds. The name of the deceased may have been mis-spelled, the *status* of the deceased may have been erroneously stated, as single when she was married or *vice versa*, the time of the deceased's death may have been mis-stated, further property of the deceased may have been discovered, or in limited grants there may have been an error affecting the limitation.

An affidavit is filed setting out clearly and fully the facts which make the proposed alteration necessary.

If property has been discovered after the grant of probate or administration, which was not included in the inventory, the executor or administrator must, in Ontario, make and deliver to the Surrogate Court by which the grant was made, an inventory of such newly discovered property, duly verified by oath.

If the administration is limited to part only of the property of the deceased, it would seem that only newly-discovered pro-

perty affected by the limited administration need be set out. R. S.O. 1897, ch. 337, sec. 9, sub-secs. 2 and 3.

If the bond already given is not sufficient to cover the whole estate, including the increased amount, a further bond should be given to meet the deficiency: *Weir*, 1 Sw. & Tr. 506.

Further fees may also have to be paid.

Where the deceased's name, or the date of his death, is altered, a new bond must be executed, in a form corresponding with the alterations.

The Registrar, under the direction of the Judge, notes upon the letters of administration that the estate has been re-sworn, and further security has been given.

There are cases in which the Court has allowed some one, other than the original administrator, to execute the bond rendered necessary by the discovery of further property of the intestate, under circumstances, for instance, where it is impossible for the administrator to do so, or where there is a pressing necessity that it should be done by some one else. The administrator being absent in Japan, and a considerable sum having been adjudged to the intestate's estate by a decree in Chancery, it became necessary to execute an additional bond, and to pay the additional duty on the estate. The Court allowed another person to file the affidavit shewing the increase, and to give the bond, but ordered that the administrator himself must execute a similar bond as soon as possible: *Ross*, 2 P.D. 274, following the cases in *Sutherland*, 4 Sw. & Tr. 189.

In *Towgood*, 2 P. & D. 408, the probate was amended by describing the deceased more fully. He had been described as of Highgate in the County of Middlesex; the description was amended to read "of Highgate in the County of Middlesex and of 33 Throgmorton Street in the City of London, Stockbroker." Lord Penzance in his judgment said: "It would be very wrong to allow anything to be omitted that had been before introduced or that might lead to complications; but I am not asked to inter-

fere with the present description, only to add to it, and that, I think, may be done.”

In Chancery proceedings it was made to appear that the date of the execution of the will was erroneously given in the letters of administration with the will annexed. The Vice-Chancellor directed the administrator to apply to the Court of Probate to have the error corrected. The latter Court ordered the grant to be so amended so that it would shew on the face of it the actual date of execution: *Allchin*, 1 P. & D. 664.

It is said in *Sheldon v. Sheldon*, 3 Notes of Cas. 255, that, if an unattested or unexecuted paper, incorporated by the testator in his will, has been omitted from the probate, it may be incorporated therein by amendment.

It is stated in a work of the highest authority, Tristram & Coote's Probate Practice, 13th ed., p. 179, that if a codicil be found after probate of a will has been granted, a separate probate of that codicil is granted, and the first probate undergoes no alteration or amendment whatever. If, however, the appointment of the executors under the will is annulled or varied by the codicil, the probate must be brought in and revoked, and probate will be granted anew of the will and codicil.

In other cases where there are two documents, a testamentary appointment and a will, for example, entitled to probate, and the will was admitted to probate without the appointment, the proper course is to revoke the probate and issue a new probate of both documents. “It is obvious, on grounds of public policy, that the probate which purports to contain the will should contain the whole, and not a part only, of the testamentary papers of the deceased. The probate should always include all the documents that go to make up the will of the deceased person:” *Crawford*, 15 P.D. 212. The same course was followed in *Harris*, 2 P. & D. 83.

In *Dodgson*, 1 Sw. & Tr. 260, a grant *ad litem* had issued, the estate being sworn for that purpose, as the practice then was,

under £50. The Court of Chancery refused to pay over a sum standing in the deceased's name, under so limited a grant. The Court of Probate, therefore, revoked the original grant, and issued a new one, limited to the suit and to receive the money.

But it would seem that the usual practice in England is to allow such an administrator to be re-sworn and to give security in any increased amount, *Tr. & Coote's*, p. 179.

Where an executrix, being a married woman, took probate as a spinster, the Court would not alter her name and description without her husband's consent: *Rev. W. Hale*, 5 Notes of Cas. 514.

In a proper case the name and description of an executor may be corrected.

If an error has been made in the engrossment of the will, it may be corrected, under the direction of the Judge.

## CHAPTER XXX.

### MOTIONS.

The rules of the Surrogate Court, Ontario, provide that "as to matters not provided for in these rules the practice is, as far as may be, to be regulated by analogy thereto. In any matter not so provided for, in which the practice cannot be regulated by such analogy such practice shall be regulated by analogy to the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario."

"Subject to rules of court, the Judge of the Surrogate Court shall have power to sit and act at any time for the transaction of any part of the business of such court, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during term."

In England, on ordinary applications for probate or letters of administration, the District Registrar makes the grant or refuses it. In special cases the point at issue is disposed of, upon motion, by a judge of the Probate Division of the High Court of Justice. There motions are made in non-contentious matters as well as in those which are contentious. By Surrogate Court Rule 1 "Non-contentious business shall include all common form business as defined by the Surrogate Courts Act and the warning of caveats."

That Act says that "common form business" shall mean the business of obtaining probate or administration where there is no contention as to the right thereto, including the passing of probates and administration through a Surrogate Court when the contest is terminated, and all business of a non-contentious nature to be taken in a Surrogate Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of caveats against the grant of probate or administration.



As the Registrars of the Surrogate Courts in Ontario have no power to make grants in any case, as is done by the District Registrars in England, all matters and causes relating to the grant and revocation of probate of wills and letters of administration, must be disposed of by the Judges of the respective Surrogate Courts. In consequence of this difference in practice, nearly all of the non-contentious questions which arise in England and are disposed of by a Judge upon motion, are in Ontario dealt with in the ordinary course of routine.

Any person served with notice of a pending motion for a grant of probate or administration, must, if he intends to oppose the grant, enter an appearance, either personally or by a solicitor, within ten days after the service upon him of the notice of motion. No further proceedings are then to be taken, except upon the special direction of the Judge. These directions would be obtained upon notice to the opposite party: Surrogate Rules 28 and 29.

Upon the failure of the party served with the notice of motion to appear, the grant may be made to the applicant, upon proof by affidavit (*a*) of the service of the notice, and (*b*) of the non-appearance as shewn by a search in the books of the Registrar.

If such grant is opposed the matter is then contentious.

A proceeding is contentious:

(*a*) When an appearance has been entered in opposition to the party proceeding.

(*b*) When a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding.

(*c*) When an application for grant is made on motion and the right to such grant is opposed.

(*d*) When an application is made to revoke a grant, or,

(*e*) When there is contention as to the right to obtain probate, or administration.

As the Judge of the Surrogate Court has power to sit and act at all times for the transaction of business, when the Registrar attends him with the papers to lead grant of probate or administration, he may direct that an order in the nature of a citation may issue requiring the person cited to accept or refuse probate or administration, but under the rule above noted, the proceedings are therefore contentious.

It may be that some question arises as to the validity of the will, the regularity of its execution, or the capacity of the testator. Or it may be sought to prove the contents of a lost, or of a nuncupative will, or the evidence of the death may be wholly presumptive. Following the analogy of practice in the High Court, the Judge would in such cases direct a motion to be made, returnable before him, on such notice to all interested parties as seems proper. But under the same rule, if the motion is opposed the matter has become contentious.

It would seem that under the English practice, a decree of the Court, which can only be obtained upon motion, is required:

1. When the estate escheats to the Crown by reason of the intestate's being a bastard and administration is sought on behalf of the Crown: *Solicitor of Duchy of Cornwall v. Next of Kin of Canning*, 5 P.D. 114. The next of kin had been cited by advertisement, and the facts were proved by affidavit. But in the case of *Griffith*, 9 P.D. 63, where the application was made on behalf of the Prince of Wales as Duke of Cornwall, the recital of the facts in the warrant of the Prince which authorized the application, was held to be sufficient evidence if the facts are fully recited.

Upon motion in *Hartley*, [1899] P. 40, it was decided, after advising with the law officers of the Crown, that the Land Transfer Act, 1897, did not apply to the Crown, so as to vest lands of an intestate bastard in the Solicitor to the Treasury as the Crown's nominee.

2. Where some person with an inferior title to probate or

administration makes application for a general grant, with or without the will annexed, or when a creditor makes the application.

In Ontario, under section 41 of the Surrogate Courts Act, only those of the next of kin or others having or pretending interest in the property of the deceased, who reside in Ontario need be cited to accept or refuse letters of administration, unless there is neither next of kin nor any person of the kindred of the deceased in the province.

Subject to that statutory qualification, the rule is that a person having an inferior right to a grant of probate or administration can only obtain such grant after all persons who have a superior right to it have renounced such right or waived it. When all persons who have a superior title, and are resident within the province, have been duly cited to accept the grant and have not done so, the grant may be decreed, in England upon motion to an applicant with an inferior title, in Ontario upon the failure of the parties who have been cited to enter an appearance to the order of citation.

The effect of an executor's renunciation or of his failure to appear and take probate when he has been served with an order of citation, is that his right to the executorship is at an end, and the right to the representation to the estate devolves as if he had not been appointed.

The Court may, however, where probate has been granted to another executor, who has since disappeared, allow the renunciation to be withdrawn, but it would be otherwise if the grant had been one of administration: *Stiles*, [1898] P. 12.

3. A grant of administration *de bonis non* to one having a derivative title, in preference to one having a direct title.

When the sole next of kin dies after taking out administration, leaving an executor, the Court may pass over the person entitled in distribution, and make the grant *de bonis non* to the executor, after citation of those beneficially interested in the property: *Carr*, 1 P. & D. 291.

4. For a grant of probate or administration where the proof of death is presumptive.

5. For grant of probate, or administration with the will annexed, of a lost will.

Where probate of a draft will is sought, the practice requires that it should be filed in the registry before the motion can be heard: *Riley* (1896), P. 9.

In most cases of lost wills the practice is to require the will to be propounded in solemn form: *Pearson* (1896), P. 289; *Apted* (1899), P. 272.

6. When there is a doubt as to the person to whom the grant should be made, or as to whether a paper is entitled to probate, or as to whether any part of it ought to be excluded from the probate, and a contest has not yet arisen.

7. For a grant, under the 59th section of the Surrogate Courts Act, to some person other than the executor named in the will, he being resident out of Ontario, or to some person other than the person entitled to administration: *Kehoe*, 7 O.W.R. 825.

8. For a grant *de novo* by reason of the incapacity of one of several personal representatives.

The practice in such case is to call in and revoke the grant already made, and to issue a new grant to the same executors or administrators. But, as we have already observed, in Ontario the revocation of grants is contentious business: *Phillips*, 2 Add. 335; *Newton*, 3 Curt. 428; *Marshall*, 1 Curt. 297.

But where a sole executor or administrator has become lunatic after taking the grant, a temporary administration will be granted on motion, without revoking the former grant: *Binfield*, 1 Cas. temp. Lee. 625; *Evans v. Tyler*, 2 Rob. 134; *Espinasse*, 3 L.R. Ir. Ch.D. 185. Such a grant may be made to the next of kin of the deceased: *Cooke* (1895), P. 68; or to a residuary legatee: *Ponsonby* (1895), P. 287.

9. When a person who is entitled to a general grant applies for a limited grant.



The Ontario Surrogate Rule 14 is the same as the English Rule 29, but the Ontario Rule 15 differs from the English Rule 30. The latter provides that no person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant *except under the direction of the Judge*. The corresponding Ontario rule is "No person entitled to a grant of administration of the property of the deceased generally shall be permitted to take a limited grant, except grants for personal estate only under section 61 of the Surrogate Courts Act."

No power is reserved to the Judge, by the Ontario rule, to make a limited grant except in the one case of a grant to the personal estate only.

By the practice of the Prerogative Court a grant limited to the only portion of an estate left unadministered issued without a renunciation or citation. In such a case, by the present practice in England, the application is reported by the Registrar to the Judge, and the grant issued under the direction of the Judge without motion. In all other cases, except where the parties entitled to the general grant have renounced or consented, the Court must be moved for a limited grant: *Tristram and Coote's Probate Practice*, 13th ed., p. 293.

Upon motion the following grants have been made:—

Administration *de bonis non* with the will annexed to a legatee limited to receive the legacy, the chain of executorship having been broken, and the person entitled to the general grant *de bonis non* being abroad and not expected to return for some years: *Steadman*, 2 Hagg. 59.

Administration to the agent of a foreigner limited to proceedings in Chancery to recover a debt, and to receive payment of a debt: *Elector of Hesse*, 1 Hagg. 93; *Harris v. Milburn*, 2 Hagg. 63; *Dodgson*, 1 Sw. & Tr. 259.

Administration to a creditor limited to filing a bill in Chancery, the person entitled to the general grant being abroad, and not having been cited: *Woolley v. Green*, 3 Phillim. 314.



10. For a temporary grant of administration for a particular purpose, during the absence from the jurisdiction of the Court of an executor or administrator to whom a grant has been already made.

The power to make such limited grants was conferred upon the Ecclesiastical Courts by 38 Geo. III ch. 87, but limited to the filing of a bill in Chancery and of carrying the decree into effect during the absence of an executor who has received probate. Section 1 of the Act provides "That at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted are or is then residing out of the jurisdiction of His Majesty's Courts of Law and Equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next of kin or legatee grounded on the affidavit hereinafter mentioned to grant such special administration as hereinafter is also mentioned."

The 74th section of the Court of Probate Act, 1857, extended this jurisdiction so as to enable the Court to make a grant in the absence from the jurisdiction, of the administrator who had taken out letters with or without the will annexed. It read thus: "The provisions of the Act passed in the thirty-eighth year of His Majesty King George the Third, chapter eighty-seven, shall apply in like manner to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of Her Majesty's Courts of Law and Equity." Section 18 of the Court of Probate Act extended these provisions "to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of Law and Equity, whether it be or be not intended to institute proceedings in the Court of Chancery." An executor's executor is the executor of the original deceased, though he becomes so, not by appointment, but by devolution of law, and an executor's executor is therefore within the provisions of the statute, so that upon his absence at the expiration

of twelve calendar months from the death of his testator the Court may grant limited administration as by these statutes provided: *Grant*, 1 P. & D. 435, "At the expiration of twelve calendar months," in the original enactment, is held to mean "at or after the expiration" of that period: *Ruddy*, 2 P. & D. 330. See also *Collier*, 2 Sw. & Tr. 444, in which a limited grant of administration with the will annexed was made to the personal representatives of a legatee as being within the spirit of 38 Geo. III. ch. 87.

When the executor dies, or returns from abroad, the administration granted during his absence does not thereupon come to an end: *Taynton v. Hannay*, 3 Bos. & Pull. 26. It would seem, however, that upon the death of the executor his executor, upon taking probate of his testator's will, might intervene in the action, and be substituted as a party, and the same course would be pursued if the executor returned within the jurisdiction: *Rainsford v. Taynton*, 7 Ves. 460. The administration under the statute is limited as to purpose, but not as to time. The executor upon his return is made a party in the usual course; and the temporary administration may account, have his costs, and be discharged: *Ib.*

2 Edw. VII. ch. 1, sec. 2 (Ont.), repeals 38 Geo. III. ch. 87, secs. 1, 2, 3, 4 and 5. So that the provisions of that Act for granting temporary administration during the absence of the executor, are not in force in this province.

But see section 39 of the Ontario Judicature Act, which gives the High Court of Justice power to remove an executor upon the same grounds as it may remove any other trustee.

10. For administration *ad bona colligenda defuncti*. See *ante* ch. 23.

11. For the revocation of letters probate or letters of administration. By the rule in force in Ontario all applications for revocation are contentious.

12. When those interested in an alleged will have been cited and have not appeared, a grant of administration has been

made on motion to the next of kin. The practice is to grant administration to the next of kin though it may be suggested that *de facto* there is a will, if the executor and persons interested have been cited to propound such will and have not appeared to the citation: *Quick* (1899), P. 187.

In *Dennis* (1899), P. 191, the deceased left a document, apparently duly executed as a will, giving all his property to the person named therein as executrix. Upon proof of personal service upon her of the citation calling upon her to bring in the will or to shew cause why administration as upon intestacy should not be granted to the next of kin, and upon proof of non-appearance, the proof being by affidavit, a grant of administration was made, without any evidence of the invalidity of the will, following *Crosby v. Norton* (1867), 36 L. J. P. & M. 55; *Morton v. Thorpe*, 3 Sw. & Tr. 179.

13. When an order in the nature of a subpoena to bring in a testamentary paper has been served upon any person, he is at liberty to enter an appearance if he thinks fit to do so: English Rule 86.

In the case of inability to comply with the subpoena, because he has not the document required, the party served should file an affidavit stating the grounds of his inability to comply with the subpoena. He may also be called upon to disclose what he knows of the existence and custody of a will. This disclosure is made upon oath in open court: *Banfield v. Pickard*, 6 P.D. 33.

It would seem that conduct money cannot be claimed in the first instance for an attendance to give evidence as to the existence and custody of testamentary documents, but his expenses should be dealt with under the power to award costs: *Wyatt*, [1898] P. 15.

Section 26 of the Surrogate Courts Act gives authority to the Court, whether any suit or petition is pending in the court or not, upon motion, or petition, or otherwise, in a summary way to order any person to produce and bring before the Regis-

trar or otherwise as the Court may order, any paper or writing being or purporting to be testamentary, which has been shewn to be in his possession or control. By Rule 21 an order is substituted for a subpoena in such cases, and has the like effect.

Sub-section 2 of the same section provides that where there are reasonable grounds for believing that any person has knowledge of a testamentary paper or writing which is not shewn to be in his possession or under his control the Court may direct his attendance for examination, either before the Registrar, or in open court, or upon interrogatories. His attendance is procured by the service upon him of an order of the Judge: Surrogate Rule 21.

Persons failing to bring in testamentary papers in their possession or under their control, or failing to attend and answer the questions or interrogatories pursuant to the order, are liable to punishment for contempt of Court. The costs of the motion, petition or other proceeding are in the discretion of the Court, section 26, sub-section 2.

Parties entitled to notice of motion are also entitled to copies of the material to be used in support of the motion, by the English Rule 127, [1862] which reads:

“Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto.”

## CHAPTER XXXI.

### CONTENTIOUS BUSINESS.

The rules relating to contentious business in Ontario declare that "A proceeding shall be adjudged contentious (*a*) when an appearance has been entered by any person in opposition to the party proceeding, or (*b*) when a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding, or (*c*) when an application for grant is made on motion and the right to such grant is opposed, or (*d*) when application is made to revoke a grant, or (*e*) when there is contention as to the right to obtain probate or administration, and before contest terminated: Contentious Rule 1.

These five classes of contentious business have something in common, and there are provisions of law applicable to all of them.

Section 28 of the Surrogate Courts Act enacts that subject to the regulations established by the rules and orders heretofore in force respecting Surrogate Courts or hereafter to be made under this Act, the witnesses, and, where necessary the parties in all contentious matters where their attendance can be had, shall be examined orally by or before the Judge of the Surrogate Court in open court; and subject to any such regulations as aforesaid, the parties may verify their respective cases by affidavit; but the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of the opposite party orally in open court as aforesaid, and, after such cross-examination, may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed."

Sections 29 and 30 of the Act enable the Surrogate Court to issue a commission, in any contentious matter, for the examina-



tion of any witness who is out of the province or too ill to attend, or where for other reasons the Court does not think fit to enforce his attendance. The examination may be upon interrogatories or otherwise, and if the witness is within the jurisdiction of the Court, the Court may order the examination of the witness to take place, without a commission, upon interrogatories or otherwise as the order may direct, before any person named in the order.

All powers vested in the County Courts to issue commissions and to order the examination of witnesses in those courts, and to enforce the examination and the attendance and answering of the witnesses, are extended to the Surrogate Courts in matters pending in the latter courts.

As the powers and procedure in the County Courts in regard to commissions, order for examinations, compelling the attendance of witnesses, etc., are governed by the Consolidated Rules of Practice, which are applicable to County Courts as well as to the High Court, it is unnecessary to go more fully into the practice in these particulars.

Section 31 of the Act makes the rules of evidence observed in the High Court applicable in the Surrogate Courts.

Section 32 gives the Surrogate Courts the same powers for compelling the attendance of witnesses, and others, and for punishing failure to attend or to produce documents, or to be sworn or to make affirmation or to give evidence, or for contempt of Court, and generally for enforcing the order and judgments of the Courts, as are vested in the County Courts.

Every Surrogate Court is given power by section 22 of the Act to try any question of fact arising in any proceeding under the Act, by a jury before the Judge of the court. The Judge issues an order allowing the trial to be by jury, and directs it to take place at some ensuing sitting of the County Court for the county. The trial is to be conducted in the same way as other trials by jury in the County Court. The right of the

parties to challenge jurors is the same as in the County Court, and the Courts and Judges have the same powers as the County Courts and County Judges in regard to the procedure and to new trials.

The question to be tried is to be reduced into writing, in such form as the Court directs, and the jury are sworn to try that question, and a true verdict give thereon according to the evidence: Section 23.

In that connection it may be noted that the Terms of the Surrogate Courts, prescribed by the Act, are the same as those of the County Court under the County Courts Act. As the practice of the Probate Court in England as it stood on the 5th day of December, 1859, is adopted in Ontario by section 32 of the Surrogate Courts Act, except in so far as that practice is varied by the Surrogate Courts Act or the Rules of Court, it is necessary to consider in what cases juries were of right, and in what cases they were in the discretion of the Court. Under section 22 of the Surrogate Courts Act the Court *may* cause the questions of fact to be tried by a jury.

Section 35 of the Court of Probate Act, 1857, gave the Court of Probate the right to try questions of fact by jury. In general the Court had a discretion to grant or refuse a jury, but in two instances the jury could be applied for as of right. If the heir-at-law, when cited or otherwise made a party, made an application to the Court for a jury, his right to have the questions of fact so tried was absolute. So, too, if all parties to the action or proceeding concurred in the application, the jury was of right. In all other cases the Court had a discretion to direct questions of fact to be tried either with or without a jury.

When the only question to be tried is whether the will was duly executed, the Court will always try it without a jury.

If the issues relate to testamentary capacity, undue influence or frauds the Court would, on the application of either party, grant a jury.

When the plaintiff propounded the contents of a lost will, and the defendant pleaded that its contents were not as alleged, the plaintiff's application for a jury was refused: *Quick v. Quick*, 3 Sw. & Tr. 460.

Upon a contest as to whether a will was revoked, the evidence being presumptive, the question was one of mixed law and fact, and a jury was refused: *Smith v. Hood*, 3 Sw. & Tr. 462.

The Court of Probate might direct an issue to be tried before a Judge at any assize or at the sittings in London or Middlesex, and either by a special or common jury, but not by a Judge of Assize without a jury: *Bushell v. Bleukhorn*, 1 P. & D. 89. The power of the Court of Probate to refer causes for trial by jury was similar to that of the Court of Chancery.

The power of the Judge of the Court of Probate to direct an issue was discretionary, and to be exercised only in a fit case. It was refused where the cause had excited considerable discussion and feeling in the county where the issue if directed, would have been tried: *Cooper v. Moss*, 1 Sw. & Tr. 143.

By the practice of the English Probate Division contentious causes group themselves under three heads.

1. Probate actions, where the contest is directed to the validity of the will. In actions of this class the main, and frequently the sole, question is whether the document propounded is a valid testamentary instrument. Where the Court has pronounced for the will in whole or in part in solemn form, probate, or administration with the will annexed, will thereafter issue in the usual way.

If the will is declared invalid, probate or administration will then issue regardless of the invalid will.

2. Administration actions. In these the question for the determination of the Court is which of two or more claimants is entitled to a grant of administration. This may involve questions of pedigree or legitimacy, or of the relative fitness of the contestants, as in *Cardeaux v. Trasler*, 4 Sw. & Tr. 48;

*Fleming v. Pelham*, 3 Hagg. 217; *Conyers v. Kitson*, 3 Hagg. 556; *Lambell v. Lambell*, 3 Hagg. 568; *Chappell v. Chappell*, 3 Curt. 429; *Farrand*, 1 P. & D. 439; or it may lead to an inquiry as to which of the claimants has the larger interest, as in *Homan*, 9 P.D. 61, where the sister of the testator was preferred to his widow as administratrix with the will annexed, on the sole ground that she had a larger interest under the will; or as to which of them is preferred as administrator by the majority of the interests as in *Iredale v. Ford*, 1 Sw. & Tr. 305.

3. Actions for the revocation of former grants of probate or administration.

In an action where grants are sought to be revoked, the party seeking the revocation obtains from the Judge a citation calling in the grant already made.

An appearance is entered to the citation, and then the contest proceeds by statement of claim, statement of defence, etc., as in a High Court action. But a direction must be obtained from the Judge as to the procedure, before any further step is taken after appearance.

A person who contemplates opposing a grant of probate or administration may file a caveat.

A caveat is a notice in writing, entitled in the proper Surrogate Court, usually that of the county in which the deceased resided, signed by the party entering it or by his solicitor, requesting that nothing be done in the estate of the deceased without notice to the party lodging the caveat, or his solicitor if the caveat is entered by a solicitor.

The party entering the caveat must,

- (a) Declare in it the nature of his interest.
- (b) State generally the grounds upon which he enters it.
- (c) Sign it, or have it signed by his solicitor.
- (d) Give, in the caveat, his address or that of his solicitor.

If these requirements are not met the caveat is without force or effect: Rule 25.



The caveat remains in force for three months, but, subject to the Judge's order, it may be renewed from time to time.

By the English rules, a caveat is in force for six months only, but it may be renewed. There is no stipulation in the English rule regarding a Judge's order for a renewal: Rule 60 of 1862.

A caveat may be entered either with the Surrogate clerk or with the Registrar of any Surrogate Court. If it is filed with the Registrar, he immediately transmits by mail notice of the filing to the Surrogate clerk. If it is filed with the Surrogate clerk, he sends a notice of it to the Surrogate Registrar, as a part of, or embodied in, the certificate which he forwards under section 45 of the Surrogate Courts Act. Sections 52 and 53 of the Act deal with caveats. Except in so far as it is altered by the Act, or the rules made under it, the practice which prevailed in the Court of Probate in England on the 5th day of December, 1859, is continued in Ontario in reference to caveats.

The person making the application against which the caveat is lodged, must then have the caveat warned. A warning to a caveat is a notice in writing entitled in the proper court under the seal of the proper Surrogate Court, signed by the Registrar and addressed to the party who entered the caveat, warning him that he must within ten days after the service of the warning, inclusive of that day, cause an appearance to be entered for him in the office of the Registrar.

The warning may be served personally, or the Registrar may mail it to the address of the person who entered the caveat, as given in the caveat, if he entered it personally, or to the address of his solicitor, if it was entered by a solicitor. The warning gives the address of the person at whose instance it issued.

If no appearance is entered, the person applying files an affidavit proving the service of the warning, the manner of the service, and the fact of non-appearance, and the party may then proceed as if no caveat had been entered.



An appearance must be entered within ten days after the service of the warning, including the day of such service. In England the time given is six days, instead of ten.

A caveat has the effect of staying the grant of probate or administration until the caveat expires; or until it is warned, and the person warned fails to appear; or, in case of appearance until the contest is terminated. If by inadvertence such a grant should be made, it would be recalled and revoked.

A caveat may be entered at any time up to the time of the grant passing the seal. But no caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal.

In one case it was said that even when a caveat had expired notice should have been given to the caveator of the application, and that to omit to do so was, to use a tender expression, to obtain the grant irregularly: *Trimlestown v. Trimlestown*, 3 Hagg. 248.

When an appearance has been filed by the person who was warned to a caveat, no further proceedings are to be taken except under the special direction of a Judge. Surrogate Court Rules 22 to 29 inclusive deal with caveats, warnings, and appearance.

It is not until the appearance has been entered that the business has become contentious.

A person served with notice of an application for probate or administration, must appear thereto within ten days, though he has not been served with any citation, or warning to a caveat: Rule 28.

The appearance may be entered either personally or by a solicitor, and the address of the party or of his solicitor must be given. The practice in regard thereto is the same as in the High Court: Contentious Rule 2.

A caveat serves a number of useful purposes.

It gives the caveator time in which to make inquiries and decide whether there are grounds for opposition to the grant.

It affords him an opportunity of raising any question in respect to the grant he may wish determined, by motion before the Surrogate Judge.

It may, under the present practice of the Probate Division in England be used to stay an application by a creditor until he files a bond to pay all creditors *pro rata*: *Brackenbury*, 2 P.D. 272.

It is, however, most frequently filed as a preliminary step to a contest as to the validity of a will, or the right to probate or administration.

Rule 66 (1862) in England requires that, before a citation issues, a caveat must be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates.

The citation is issued upon an affidavit being filed. Rule 69 (1862) Eng., provides that "no citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the registry."

## CHAPTER XXXII.

### PROOF IN SOLEMN FORM.

A probate is an instrument in writing under the seal of a Surrogate Court and signed by the Registrar thereof, certifying that the last will and testament and codicils, if any, of the deceased, a true copy of which is thereunto annexed, have been proved and registered in the said Surrogate Court; and that the administration of all and singular the property of the said deceased and any way concerning his will was granted to the executors named in the probate, they having been first sworn faithfully to administer the same by paying the just debts of the deceased, and the legacies in the will and codicils, and by distributing the residue according to law, and to exhibit an inventory under oath when lawfully required to do so.

Annexed to the certificate just mentioned and forming a part of the probate is a transcript or *verbatim* copy of the contents of the will and codicils, if any, as proved.

A will may be proved in common form or in solemn form. Probate in common form is usually issued upon the *ex parte* application of the executor, and the proof to lead the grant is by affidavit.

In solemn form the will is proved in open court upon notice to all parties interested, and the Court must be satisfied upon the examination of witnesses, of the due execution of the will, and of the testamentary capacity of the testator.

When it appears by the affidavits that the will was not properly attested by the witnesses under the statute, the Court will refuse to grant probate, but the will may be propounded and established: *Ayling*, 1 Curt. 913; *Watts*, *ib.*, 594.

When a will is to be proved in solemn form, it is necessary to cite or summon all persons who have an interest in the personal

property of the deceased, to be present at the probation and approbation of the will. The widow and the next of kin to whom administration would be committed if the testator had died intestate, as well as those having an interest under the will, must be included.

It would seem that in England the heir-at-law, since the Land Transfer Act, 1897, *must* be cited if the will deals with real estate.

In Ontario by section 54 of the Surrogate Courts Act, if the will affects real estate, the heirs-at-law and devisees *may* be cited or summoned in the same way as next of kin are in regard to personal property and may be permitted to become parties, but it is not *necessary* to cite the heirs-at-law or other persons having or claiming interest in the real estate, unless the Court, with reference to the circumstances of the case, directs the same to be done.

The provisions of sections 61, 62, and 63 of the Court of Probate Act, 1867, are expressed somewhat differently.

It is probable that in the great majority of cases the Surrogate Courts would, wherever the title to land is affected, having reference to that circumstance, and with a view to preventing the same question from being litigated twice, direct the persons interested in the land to be cited.

By the practice of the Ecclesiastical Courts, contentious proceedings were begun by citation, and not by writ of summons. In Ontario the action is begun in the same way, but a Judge's order is substituted for the citation.

In England the proceedings are begun in the Probate Division by the issue of a writ of summons in the place of a citation. If a caveat has been warned, the person who appears to the warning is served, as well as the next of kin and other parties entitled. An appearance is then entered, and the procedure is that of an ordinary action under the Judicature Act and Rules. In so far as no provision is made by these, the Rules and Orders

in contentious business made under the Court of Probate Act, and the former practice of the old Prerogative Courts, are still applicable. Accordingly, when an executor propounds a will in a suit begun by writ of summons, wherein he is plaintiff, and the next of kin is defendant, and the plaintiff, after the defendant has appeared, wishes to cite certain devisees who are affected by alterations in the will propounded, it was decided that the devisees might be properly brought before the Court by citation to see the proceedings, without being served with the writ, or made parties to the action, as that was the former practice, and the Judicature Act and Rules made no change in that regard: *Kennaway v. Kennaway*, 1 P.D. 148.

In Ontario a Judge's order in the nature of a citation is substituted for the citation: Surrogate Courts Rule 21.

By Rule 28 "Any person intending to oppose a grant of probate or administration, for which application has been made to a Surrogate Court, must within ten days after service appear, either personally or by solicitor, and enter an appearance in such court, in which appearance the address of the party, or of his solicitor, shall be given. This rule is to apply whether the person intending to oppose the grant has or has not been previously warned to a caveat, or served with a citation." By Rule 29 it is provided that, "When a party intending to oppose a grant has filed an appearance with the Registrar, no further steps in respect to such grant shall be taken, except under the special direction of the Judge."

Rules 2 and 3 for contentious business provide that the practice as to appearance shall, as far as practicable, be the same as in the High Court; and that in contentious proceedings the practice and procedure shall, as nearly as may be, correspond with the practice and procedure in the High Court after appearance entered.

Rule 4 seems to contemplate that further proceedings must be instituted by the person who enters an appearance. But it



will frequently happen that the person who appears is in the position of a defendant. Under Rule 8 in contentious business, either party may apply to the Judge for a direction as to the course to be pursued.

That direction will naturally, where the matter in question is the proof of the will in solemn form by the executors, make them the plaintiffs, and those who are opposed, the defendants; and the time within which the pleadings are to be filed and served will be governed by the practice in the High Court.

The party opposing the will may, with his statement of defence, give notice to the party setting up the same that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to liability to costs in the discretion of the Judge: Rule 6.

Any person not named in the petition for the grant, or in the order of the Judge directing that those interested in the estate or the administration shall enter an appearance, may intervene and appear thereto on filing an affidavit shewing that he is interested in the estate of the deceased: Rule 5, contentious.

An executor who has proved a will in common form may be compelled afterwards to prove it in solemn form, at the instance of any person interested. If the proof in solemn form, or *per testes*, as it is sometimes called, fails, the probate will be revoked. The practice is for the person interested to take out an order in the nature of a citation to the executor, to prove the will in solemn form. This order will be made in a proper case upon proof of the facts by affidavit. The executor then appears to the citation; and, by Rule 4, if he does not afterwards use due diligence in the prosecution of the proceedings, the appellant may obtain an order directing him to plead within a time to be limited by the order. Thus a probate granted in common form in 1808 was revoked in 1818 in proceedings instituted by the citation of the executor, by the next of kin, to prove the

will *per testes* in due form of law: *Satterthwaite v. Satterthwaite*, 3 Phillim. 1. And a grant made in common form in 1807 was in a similar proceeding revoked in 1820: *Finucane v. Gayfere*, 3 Phillim. 405. The time within which an executor after proof by him of the will in common form, may be called upon to prove it *per testes* is given by some of the old authorities at thirty years. In some cases it has been said that there is no specific limit as to the time: *Newell v. Weeks*, 2 Phillim. 231; *Merryweather v. Turner*, 3 Curt. 802, 817; *Topping*, 2 Robert. 620. If, however, a person who is entitled to have a will proved in solemn form chooses to let a long time elapse before he proceeds, he is still entitled to have the law strictly administered, but he is not entitled to any indulgence: *Blake v. Knight*, 3 Curt. 553.

Wills are proved in solemn form, not only at the instance of persons who desire to invalidate them, but also at the instance of the executors themselves. The next of kin and others interested under the will or upon an intestacy are cited to see the proceedings, and, thereafter, upon their appearance or upon default of appearance or of defence, the executor proceeds to prove the will by the evidence of the witnesses. By so doing he avoids all risk of the will being set aside after the witnesses are dead; for, if the proceedings are regular, upon proof of the will in solemn form, the will cannot afterwards be set aside: *Lester v. Smith*, 3 Sw. & Tr. 53.

The executor who proves a will in solemn form is entitled to the costs of the proceedings out of the estate: *Burls v. Burls*, 1 P. & D. 472.

But an executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of the will, by calling upon those interested under it to prove it in solemn form, even when he has discovered that it is invalid. The executor of the executor is in the same position in that regard: *Chamberlain*, 1 P. & D. 316.

The next of kin is also, as of right, entitled to have the will proved in solemn form, and he does not lose that right by

acquiescence in the proof being made in common form: even though he has received a legacy under the will, he may still call in the probate and put the executor to the proof *per testes*: *Bell v. Armstrong*, 1 Add. 370; *Merryweather v. Turner*, 2 Curt. 802; *Core v. Spence*, 1 Add. 374. Long acquiescence unexplained, and the absence of circumstances of suspicion as to the validity of the will, may amount to a waiver of the rights of the next of kin: *Hoffman v. Norris*, 2 Phillim. 250; *Braham v. Burchell*, 3 Add. 257. But whether there is a waiver of the right or not will depend upon circumstances. A will having been found in which the plaintiff was named executor, he gave notice to the defendant, who was about to obtain a grant as interested under a previous will, and filed a caveat. Before the caveat had been warned, and therefore before the proceedings had become contentious, he withdrew it, and intimated to the defendant that he did not intend to attempt to establish the later will. Administration with the earlier will annexed issued to the defendant. Upon the plaintiff taking out a citation calling upon the defendant to bring in the administration and shew cause why it should not be revoked, it was held that the plaintiff was not estopped from continuing the suit to determine which was the last will of the deceased: *Goddard v. Smith*, 3 P. & D. 7.

A legatee, even if a minor, who after receiving a legacy wishes to dispute the will, must bring into court what he has been paid: *Goddard v. Norton*, 5 Notes of Cases 76; *Braham v. Burchell*, 3 Add. 256.

When an executor propounds and proves a will *per testes* after citation to the next of kin, not only those of the next of kin so cited, but others who have not been cited, but are aware of the suit and privy to it, are debarred from requiring the will to be again proved in solemn form: *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486. But that does not apply to a case in which the decree of the Court is the result of a compromise. Probate in solemn form is irrevocable, where all the parties adversely affected by it have been parties or have been privy to the suit, and the

judgment has not been the result of a compromise, unsanctioned by the parties who were not cognizant of the negotiations for it and are adversely affected by it, unless the existence of a later will is discovered after the judgment: See *Wytcherly v. Andrews*, 2 P. & D. 327.

A person who is not a party to proceedings to establish a will, will be bound, if he was cognizant of the proceedings and had a right to intervene. The fact that he was cognizant of, and assisted in, a previous action to test the validity of a will, does not bind him if he had not then any interest. He may set up as his case, that since the previous action he had discovered that he was a legatee under an earlier will which there was a conspiracy to suppress, and that the will proved in the former action was a forgery: *Young v. Hallaway* (1895), P. 87.

A revocation obtained in such a proceeding will enure for the benefit of all parties to the first action, who were adversely affected by the first probate.

The Court will not sanction a compromise which would affect infants or other persons who are not parties to the compromise, and in any case the compromise will be approved only in an action properly before the Court. Such sanction cannot be given when no action is pending: *Norman v. Strains*, 6 P.D. 219.

When the compromise has been obtained by fraud, and the will proved was forged by one of the parties to the action, upon the establishment of the forgery and the fraud the compromise may be set aside in the Chancery Division, and the probate revoked by the Probate Division: *Priestman v. Thomas*, 9 P.D. 70.

The party propounding a will has the right to call upon those who oppose it to shew that they have some interest; but one opponent of the will cannot call upon another to prove his interest in the contest: *Hingston v. Tucker*, 2 Sw. & Tr. 596.

To prove the due execution of the will, it is necessary to examine only one of the attesting witnesses, if his evidence is clear as to the due and proper execution of the will: *Belbin v.*



*Skeats*, 1 Sw. & Tr. 148. If he fails to prove the due execution of the will, then the party who propounds the will is bound to call the other attesting witness, though he may be an adverse or even a hostile witness: *Owen v. Williams*, 4 Sw. & Tr. 202. If an attesting witness, called by the party propounding the will, gives evidence against the will, the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue, and to prove that he has on other occasions made statements inconsistent with his evidence, although he is not a hostile witness, and denies having made the statements: *Coles v. Coles*, 1 P. & D. 70.

When the deceased was a bastard, or died without any known relation, the Attorney-General should be made a party.

A creditor who has been appointed administrator, has such an interest in the estate as will entitle him to have the will proved in solemn form. A person who has been appointed administrator under section 59 of the Surrogate Courts Act, would have the same right so long as his administration was unrevoked, and so also would a person appointed administrator for a temporary purpose under section 42 of the Act, during the continuance of the grant: *Menzies v. Pulbrook*, 2 Curt. 851.

An executor, legatee or devisee named in any other testamentary instrument of the deceased, whose interest is adversely affected by the will in question, has the right to have the will proved in solemn form, and the right extends to their representatives.

It would seem that a purchaser of the real property disposed of by a will, if he insists upon having the will proved in an action for specific performance, there being no valid objection to this title, is liable for the costs of the action, upon the will being established, even though the heir-at-law was contesting the will in other proceedings: *Grove v. Bastard*, 1 De G. M. & G. 69; *Scoones v. Morrell*, 1 Beav. 251.

The fact that some of the persons interested are infants or lunatics is no reason why they should not be cited. We have



already noted how service of the order of citation is made in such cases. *Ante*, p. 210.

Probate in solemn form is, with one exception, when granted upon decree, without compromise, irrevocable as against all parties to the proceedings, all persons who were cited to see the proceedings, and all persons who, though not cited, were privy to the proceedings and had knowledge of them, provided they had such an interest as would enable them to intervene. It is said that the one exception is the case of the subsequent discovery of a later will, and that the probate, though the will be proved *per testes*, will be revoked if a will of later date is discovered after the grant in solemn form. This seems to be the established practice, though the authority cited for it in some of the works on probate practice does not fully bear it out: *Thomas v. Priestman*, 9 P.D. 70. That case seems rather to be authority for the proposition that probate obtained upon proof of the will in solemn form, may be revoked for fraud.

The grounds on which probate obtained upon proof in solemn form may afterwards be set aside are, if fraud is shewn, or if a later will is discovered. In either of these cases the executor may again be cited and the probate revoked.

Sections 22 and 23 of the Surrogate Courts Act make provisions for the trial of questions of fact by a jury.

The persons who are entitled to propound a will for proof in solemn form are the executors, or failing them the residuary legatee, a legatee or devisee, or where the residue has not disposed of, any person entitled to share in the residue. These may propound it either of their own motion, or because some person whose interests are adverse to the will has compelled them to take that step.

The person who is adverse to a grant of probate or administration files a caveat. This is then warned by those who support the grant. Those opposed must then enter an appearance. After the appearance the proceedings are regulated by analogy

to the practice of the High Court, and by the directions of the Judge.

Not only may an executor or administrator with the will annexed, who has proved it in common form, be compelled to prove it in solemn form, but an executor named in a will who, without having obtained probate, has intermeddled with the estate, so as to shew thereby an intention to accept the executorship, or so as to make him liable as executor *de son tort*, may also be compelled to prove the will in solemn form.

An executor who has not accepted probate or intermeddled with the estate, upon his being cited to prove the will in solemn form, may, it seems, adopt any one of four courses.

(1) He may appear and pray time to consider whether he will propound the will or not. Formerly a grant *ad colligendum* was made to some one for the interval allowed to the executor for consideration, but the practice seems to have become obsolete. The time to be allowed for consideration is in the discretion of the Judge.

(2) He may renounce probate.

(3) He may appear and propound the will.

(4) He may, without formal renunciation, either refuse to propound the will, or fail to appear to the citation.

Upon the renunciation of the executor, or upon his failure to appear to the citation, the other parties entitled may proceed to propound the will.

A residuary or other legatee who propounds the will in solemn form *loco executoris* is entitled to the costs of the proceedings out of the estate: *Williams v. Gonde*, 1 Hagg. 610; *Thorne v. Rooke*, 2 Curt. 831; *Sutton v. Drax*, 2 Phill. 323. But unless the executor has renounced probate, or has been cited to take probate and has failed to do so, he will be entitled to probate of the will after it is proved in solemn form by the legatee or next of kin. The fact that he was cited to propound the will and has not done so, does not affect his right: *Bewsher v. Williams*, 3 Sw. & Tr. 62.

The will having been proved in solemn form, the person having a prior right to the grant takes it in preference to the person of inferior title who has established the will. The executor who has established the will can repay himself out of the estate. One establishing the will without being executor should apply to the Court to include in the decree establishing the will an order to pay his costs out of the estate. Such an order has been made afterwards on special application: *Bewsher v. Williams*, 3 Sw. & Tr. 62.

In all cases in which there is a contention as to the grant of probate or administration, whether the contest is based on the alleged invalidity of the will or otherwise, the parties may agree to have it transferred into the High Court, on a case to be prepared.

A Judge of the High Court may, upon motion supported by affidavits, and upon reasonable notice to the other side, remove any proceeding or cause in which there is a dispute, whether of law or fact, relating to matters and causes testamentary into the High Court, provided it is sufficiently important to render that course proper, and the amount involved exceeds \$2,000. Upon the removal of the cause or proceeding the ordinary practice of the High Court is applicable: Surrogate Courts Act, secs. 33, 34, and 35.

Upon an application for probate in solemn form the executors cite the next of kin, but they may take out an order citing all persons interested under the will to see proceedings, and this seems the better course, as they cannot thereafter allege collusion between the executor and the next of kin: *Colvin v. Fraser*, 1 Hagg. 107. The executors would to some extent represent and bind all those interested in the will, upon the citation of the next of kin: *Wood v. Medley*, 1 Hagg. 657.

Ordinarily if those cited in such a case appear, they will not be paid their costs out of the estate: *Colvin v. Fraser*, 2 Hagg. 368.

## CHAPTER XXXIII.

### REVOCATION OF GRANTS.

Section 60 of the Surrogate Courts Act provides that, "After a grant of administration no person shall have power to sue or prosecute any action, or otherwise act as executor of the deceased as to the property comprised in or affected by such grant of administration, until such administration has been recalled or revoked." This section reproduces section 75 of the Court of Probate Act, 1857, with the substitution of "property" for "personal estate," and one or two slight verbal changes.

The Surrogate Courts have full power "to grant probates of wills and commit letters of administration of the property of persons dying intestate, having property in Ontario, and to *revoke* such probate of wills and letters of administration": Section 18, sub-section 1.

A grant is not revoked arbitrarily, but for just cause; and in making a revocation the Court is only resuming into its own hands the powers with which it parted by circumvention or on inaccurate or false suggestions.

The Court revokes a grant made to a person who has no interest. Such a person may have obtained the grant fraudulently and *mala fide*, either by directly making a false suggestion, or by surreptitious and clandestine conduct in concealing material facts which should have been made known to the Court.

The grant may also be revoked when the false suggestion was made in ignorance or by inadvertence.

It also revokes a grant which has been lawfully made, but which owing to changed circumstances or otherwise, has become inoperative and useless, or which, if allowed to continue, would prevent the administration of the estate.

The revocation may be on the petition of the grantee himself, or with his consent and co-operation.



Persons who are entitled to the grant and have voluntarily taken upon themselves the duties of their office, will not be relieved: *Hellem v. Severs*, 24 Gr. 320.

It is said that there is no time limited within which the revocation must be made.

When application is made to revoke a grant, the business is contentious: Contentious Rule 1.

Revocation of a grant is procured in either of two ways. If the grant has been recently made, the unsuccessful applicant for it, may, if the judgment making the grant is erroneous, have it reversed, upon an appeal from the Surrogate Court to a Divisional Court of the High Court of Justice. We shall consider appeals in a later chapter.

It may be, however, that there was no contest over the grant in the first instance, or the facts which justify the proceedings for revocation may have come to light long after the time for an appeal had gone by. The other and more usual way of procuring the revocation of probate or letters of administration is by suit. In England this suit is begun by writ of summons. In Ontario it is begun by a citation issued out of the Surrogate Court which made the grant. The order of citation directs the executor or administrator to bring in the probate or administration, and shew cause why it should not be revoked. If it is found impossible to get the first grant brought in, it will be decreed null and void, and a new grant will be made to the person entitled: *Langley*, 2 Robt. 407.

When the revoked grant had been lost before revocation, the Court has required an undertaking to be given that the lost grant would be brought in, if found, and that it would not be acted on: *Carr*, 1 Sw. & Tr. 111.

The proctors who had obtained letters of administration and retained them under their lien for an unpaid bill of costs, declined to bring them into the registry for cancellation. The administrator was cited, but did not shew cause against the revocation, and it appearing that the administrator was aware



that there was a will of the deceased in existence when he took out administration, the grant was revoked without the letters having been brought in, and the plaintiff was ordered to bring them in, if at any future time they came into his possession: *Barnes v. Durham*, 1 P. & D. 728.

If an executor who has proved a will in common form is cited to prove it in solemn form and fails in the proof, the probate is revoked.

Having proved the will once *per testes*, he cannot be again called upon to prove the will, by any person who was before cited to see the proceedings or who was privy to the proceedings. But if fraud can be shewn, or if a later will is subsequently discovered, the parties having an interest may again take proceedings for revocation: *Thomas v. Priestman*, 9 P.D. 70. But if there has been no fraud or circumvention practised upon the Court or the parties, the allegation that the probate was granted in common form on consent, and that the terms on which the consent was given have not been carried out, will not suffice to obtain a revocation of the grant: *Nicol v. Askew*, 2 Moo. P.C. 88. "The decree of the Court of Probate in granting probate could only be reversed upon the clearest proof of fraud and circumvention in procuring it."

If an executor obtains probate of a will, while a suit is pending touching the validity of the will in a court having jurisdiction in the country of the deceased's domicile, such probate will be revoked: *Trimelston v. Trimelston*, 3 Hagg. 248.

Probate granted to a minor on the tacit suggestion or understanding that he is of full age, will be set aside.

So also will probate of the will of a living person: *Napier*, 1 Phill. 83.

If administration is revoked because improvidently granted before the expiration of fourteen days from the intestate's death, Toller, in his *Law of Executors and Administrators*, says that the new grant will be made to the same person.

Administration granted to the supposed widow will be revoked on its being shewn that there was no legal marriage: *Moore*, 3 Notes of Cases 601.

So, too, when those who obtained administration as next of kin proved later to be illegitimate: *Bergman*, 2 Notes of Cases 22.

A married woman was joint executrix and had taken out probate, but had not intermeddled with the estate. The bank of England refused to allow the transfer of stock without the concurrence of her husband, who was abroad. The probate was in these circumstances revoked, and a new grant made to the other executor: *Dye*, 2 Robert. 343.

It has been said that before the statute, 21 Hen. VIII. ch. 5, the Ordinary could repeal a grant of administration at his pleasure: *Brown v. Wood*, Aleyn 36, but since that statute it can only be repealed for just cause.

A limited administration may be revoked if there has been some misrepresentation in obtaining the grant, but the Court revokes it with reluctance.

Administration granted to the next of kin, may be repealed, not arbitrarily, but upon just cause: *Koster v. Sapte*, 1 Curt. 691.

It has been revoked where the next of kin has come too hastily to take out administration and it has been inadvertently granted within the fourteen days; or where it has been granted to a person not entitled to it, and those having prior right have not been cited: *Ravenscroft v. Ravenscroft*, 1 Lea. 305. Such administration may be revoked upon the application of those having the prior right to the grant, unless the case comes within section 41 or section 56 of the Surrogate Courts Act. See *Carr v. O'Rourke*, 3 O.L.R. 632.

Administration may be revoked if the next of kin to whom the grant was made becomes a lunatic or otherwise incapable: *Offley v. Best*, 1 Sid. 373. And it is said also if he goes out of the country.

The ordinary practice, if the executor becomes disabled, as,

for example, by lunacy, is to make a grant of administration with the will annexed, limited until his recovery.

As administration may be repealed upon proper grounds even when committed to the next of kin or others having the statutory right thereto, it may be revoked when it has been entrusted to some one who could not claim it of right, but whose appointment is wholly in the discretion of the Court. Examples of this are where the grant has been made to a next of kin and one not next of kin, as to a sister and her husband: *Brown v. Wood*, Aleyn 36; or to a relative who is not the next of kin: *Blockborough v. Davies*, 1 Salk. 38; or to a creditor before the next of kin has renounced; the administration in such cases is good until revoked.

Administration with the will annexed was committed to the tenant for life of certain property, limited to his interest therein. He having conveyed his life interest to the remainderman, the letters of administration were revoked, and a new grant made to the remainderman, limited to the same property: *Ferrier*, 1 Hagg. 241.

But in a later case, where a general grant of administration with the will annexed was made to a woman who intermeddled with the estate and afterwards married, and was then deserted by her husband, the Court refused to revoke the administration, though she was desirous of having it done: *Reid*, 11 P.D. 70.

In the case of *Dye*, 2 Rob. 343, probate was granted to an executor and an executrix who was a married woman. The husband having deserted her, the probate was revoked, and re-granted to the executor alone. The executrix had not intermeddled with the estate, which distinguished the case from *Reid*, *ante*.

The Court has greater authority over an administration with the will annexed, granted to a creditor, than over an administration under the statute. Accordingly, a creditor, having obtained administration with the will annexed, paid his own debt, and left the country. The Court revoked the grant, allowed

the executor to retract his renunciation, and granted him probate of the will: *Jenkins*, 3 Phillim. 33.

In *Bradshaw*, 13 P.D. 18, the Court revoked a grant of administration made to a creditor, who upon receiving the grant and satisfying his own claim absconded, and could not be found. The revocation was made without citing him, and a new grant made to the next of kin of the intestate: See also *Hoare*, 2 Sw. & Tr. 361.

The last three cases were followed and the principle extended in *Cavell*, 15 P.D. 8, in that case the administrator, who was also one of the residuary legatees, having partly administered the estate, left his home and no trace of him could be found, though several years had elapsed. The Court revoked the grant made to him, and made a fresh grant *de bonis non*, to another of the residuary legatees.

The creditor receives administration not because of any right he has under any statute, but by the practice of the Court: *Menzies v. Piulbrook*, 2 Curt. 850.

Where the Court of Chancery, after the issue of letters of administration, put a different construction on the will from that of the Prerogative Court, the Court of Probate revoked the grant, and made a new one in accordance with the decree of the Court of Chancery: *Warren v. Kelson*, 1 Sw. & Tr. 290.

Administration granted to the elected guardian of the intestate's children was revoked on its being made to appear that there was a testamentary guardian who had not renounced: *Morris*, 2 Sw. & Tr. 360.

If the person to whom the grant is made has died before it has passed the seal, it will be revoked.

If two executors prove a will and one of them becomes a lunatic, or if from illness one of them becomes incapable of acting, the probate will be revoked and a new grant made to the other executor, the right being reserved to the other executor to take probate upon the removal of the disability: *Powell* and



*Somerby*, two unreported cases cited in *Tristram & Coote*, 13 ed., p. 191; *Shaw* (1905), P. 92.

Where administration with the will annexed has been granted to two or more residuary legatees, of whom one became a lunatic, the grant is revoked and a new grant made to the same administrator: *Rev. W. Phillips*, 2 Add. 335.

If administration with the will annexed has been granted, and a codicil is afterwards found, a separate grant cannot be made of the latter, as in the case of a probate, but the administration *cum testamento annexo* must be revoked and a new administration taken with both the will and codicil annexed: *Tristram & Coote*, 13 ed., p. 193.

Where probate of one will has been granted, and there are two testamentary documents, upon proper proof of the second, the Court will revoke the probate already issued; and make a new grant of probate of both documents: *Harris*, 2 P. & D. 83; *Crawford*, 15 P.D. 212.

A revocation will be made upon the application of the grantee, upon good cause being shewn by affidavit; but if the application is made by any other person, the consent of the grantee must be filed, or he must be cited. The new grant is issued as soon as the former grant is revoked.

A creditor cannot make an application for revocation, because he cannot demand a grant to be made to himself as of right: *Bergman*, 2 Notes of Cases 22.

An executor who has proved a will in common form cannot attack its validity by citing those interested in it to propound it in solemn form or otherwise. The executor of an executor is in the same position: *Chamberlain*, 1 P. & D. 316.

But when probate was granted to an executor in the belief that the testator was dead, having been killed in battle, and it was found later that he was alive, the probate was, on motion, at the instance of the executor, revoked, and declared null and void. The testator at the same time appeared personally and



the original will with the revoked probate, was ordered to be delivered out to him: *Napier*, 1 Phillim.

If administration is granted to a younger brother, the elder brother cannot have it repealed unless it has been granted by surprise: *Ayliff v. Ayliff*, 2 Keb. 812. Nor can the nephew procure the revocation of a grant made to the niece: *Hill v. Bird*, Sty. 102. A grant made to one creditor will not be revoked at the instance of a creditor for a larger amount: *Dubois v. Trout*, 12 Mod. 438. A grant to one, where two had an equal right, is good: *Taylor v. Shore*, T. Jones 161. Nor will the grant to one of the next of kin, obtained in the suggestion that he is the sole next of kin, be revoked, though other next of kin are afterwards discovered, and all interested parties consent to the revocation, and to a new grant to another of the next of kin: *Heslop*, 1 Rob. 457.

Nor will the Court revoke a grant limited to proceedings in Chancery, before the action is ended, to enable the next of kin to take a general grant: *Brown*, 2 P. & D. 455.

In the event of the revocation of temporary grants of administration, great confusion would ensue if proceedings begun by or against the administrator lapsed owing to the termination of his right to represent the estate. To avoid this the following enactment was passed as section 76 of the Court of Probate Act, 1857.

**Court of Probate Act, sec. 76.**—"Where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new

executor or administrator, but subject to such conditions and variations, if any, as such Court may direct."

This section is 62 of the Surrogate Courts Act, Ontario; section 21 of the Administration Act, British Columbia, and section 92 of the Surrogate Courts Act, Manitoba.

In like manner it was found necessary to prevent the possibility of a debtor who has paid to the person having official recognition as executor or administrator, from being called upon again to pay the same debt to the person obtaining a new grant upon the revocation of the former one. Hence, sections 77 and 78 of the Court of Probate Act were passed. They are as follows:

77. Where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation thereof shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.

78. All persons and corporations making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration, granted in respect of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

These sections are 63 and 64 of the Surrogate Courts Act, Ontario; 22 and 23 of the Administration Act, British Columbia; and sections 93 and 94 of the Surrogate Courts Act, Manitoba.

## CHAPTER XXXIV.

### REMOVAL OF EXECUTOR OR ADMINISTRATOR.

The High Court has, in Ontario, the same jurisdiction over executors and administrators, by virtue of section 26 of the Judicature Act, as was possessed by the Court of Chancery in England on the 4th day of March, 1837. The Court has jurisdiction to compel personal representatives to account for their administration of the deceased's estate. Consolidated Rules 944-958, govern the procedure in regard thereto. It has power also to fix their compensation. See R.S.O. ch. 129, sec. 40, as amended by 63 Vict. ch. 17, sec. 18, sub-sec. 2. It may also direct their management of the estate, and if necessary restrain them from acting, and appoint a receiver in their stead. Thus in *Johnson v. Mackenzie*, 20 O.R. 131, one of the persons named as an executor was, at the time the will was made, in excellent credit and circumstances, but after the death of the testator he became insolvent and assigned his property for the benefit of his creditors. It appeared that he had also become addicted to drink. There was no formal order made for the removal of the executor, but an injunction was ordered to restrain him from inter-meddling with the estate, and a receiver was appointed. See also *Harrold v. Wallis*, 9 Gr. 443; *Aikins v. Blain*, 11 Gr. 212.

Upon the retirement of the executor the Court has power under the Trustee Act, 1850, which defines "trust" and "trustee" as extending to and including "the duties incident to the office of personal representatives of a deceased person, to appoint in his place a trustee or trustees to perform the duties of an executor: *Re Moore, McAlpine v. Moore*, 21 Ch. D. 778.

In *Re Bush*, 19 O.R. 1, it was decided that though the Court may, in a proper case, appoint a trustee to perform the duties of an executor, it had no power to remove an executor without his consent. He is the appointee of the testator, and the Court could

not remove him, so long as there is personal estate to be administered, and he is an executor. This decision was prior to the enactment of section 39 of the Judicature Act, by 57 Vict. ch. 18, sec. 4.

See also *McPhearsan v. Irvine*, 26 O.R. 438.

That section is as follows:

39. (1) The High Court may remove an executor or administrator upon the same grounds as such Court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

(2) The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.

(3) Subject to any rules to be made under this Act the practice in force for the removal of any other trustee shall be applicable to proceedings to be taken in the High Court under this section.

(4) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed, and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died.

(5) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor under this section, whether such person acted alone or was the last survivor of several executors.

(6) A certified copy of the order of removal shall be filed with the Surrogate Clerk and another copy with the Registrar of the Surrogate Court by which probate of administration was granted, and such officers shall, at or upon the entry of the grant



in the registers in their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where such grant is indexed. 59 Vict. ch. 18, sec. 4.

By that section, the power of the High Court to remove an executor is made as extensive as its power to remove a trustee.

By section 7 of 63 Vict. ch. 17, sub-section 6, of section 39 of the Judicature Act is amended by adding thereto the following words: "The date of the grant of the letters probate or the letters of administration shall be endorsed upon the copy of the order filed with the Surrogate Clerk."

The grounds upon which trustees may be removed have been discussed in numerous cases. In *Letterstedt v. Broers*, 9 A.C. 371, after quoting from Story's Equity Jurisprudence, section 1289, that, "In cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity," the Court proceeds to say that "It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story, is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees, for a variety of reasons, in non-contentious cases. And, therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that the trustees exist for the



benefit of those to whom the creator of the trust has given the trust estate." . . . "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries." . . . "Friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded."

The fact that a trustee was one of the executors did not, before section 39 of the Judicature Act, prevent his removal from the trust when there is none of the estate unadministered and no property held by virtue of the office of executor, so that he is a trustee only: *Re Stamford, Payne v. Stamford*, 1896, 1 Ch. 288.

Failure of duty from misunderstanding is not a ground for removal: *Attorney-General v. Cooper's Co.*, 19 Ves. 492.

Nor is the mere fact of dissension between the trustee and the beneficiaries of the trust: *Forester v. Davis*, 4 De. G. F. & J. 133.

A reason for not appointing a person as trustee may not be a ground for his removal if he be already appointed: *Attorney-General v. Clapham*, 10 Hare 613.

The refusal of a trustee to concur in sale of trust property, with the approval of the *cestuis que trust*, unless he were furnished with the title deeds belonging to another and independent trust, to which he was not entitled, and his refusal to withdraw from the trusts so as to facilitate the sale, caused his removal from the trust, and he was ordered to pay the costs: *Palairot v. Carew*, 32 Beav. 564.

The executrix of a deceased and sole trustee having declined to receive and pay the dividends of stock standing in the name

of the trustee, the *cestuis que trust* filed a bill for the appointment of a new trustee, the transfer of the trust fund and the payment of a dividend; the new trustee was appointed, but as the defendant had done no wrong act, and as the plaintiff had proceeded by bill while he had an ample remedy by petition under the Trustee Act, the defendant was awarded full costs: *Thomas v. Griffiths*, 2 De G. F. & J. 555.

Where a person was appointed a trustee by will and the appointment was revoked by a codicil which made another appointment, the trustee appointed by the codicil retired in favour of the excluded trustee on being paid £75, and executed a deed appointing the excluded trustee in his place; the appointment was revoked, the deed cancelled, the conveyance declared void, and the £75 ordered to be paid over as an asset of the estate: *Sugden v. Crossland*, 3 Sm. & G. 192.

An application under section 39 of the Judicature Act for the removal of an executor and trustee on the ground of his insolvency, was made upon petition, and was opposed. It was held that, if there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by action, as it was not the intention of the English Trustee Act, 1850, to deprive retiring trustees of their right to have their accounts taken in the presence of their *cestuis que trust*, or of their lien upon the trust estate for any balance due them, and the petition was dismissed with costs.

See *Re Coombs*, 51 L.T.N.S. 45, in which it is said that a resisting trustee will not be removed on petition under the Trustee Act, 1850.

Charges of misconduct must be made by bill, not by petition: *Re Bridgman*, 1 Dr. & Sm. 164.

In such a bill every act of the trustee's misconduct may be set out, corrupt and improper motives may be charged: *Portsmouth, Earl of, v. Fellows*, 5 Madd. 450.

If the trustee has accepted the office, but refuses to act, an action must be brought for his removal: *Anon*, 4 Ir. Eq. R. 700.

Where the whole estate is less than \$1,000, the Surrogate Court which granted the probate has the same powers and authority to remove an executor as the High Court has, under section 39 of the Judicature Act.

Unless the executor removed by the Surrogate Court or the High Court is a sole executor, no new appointment need be made to fill the vacancy, and if no new appointment is made the continuing executors have as full power as if the removed executor had died.

The practice in the Surrogate Court under this section is the same as for the revocation of probate.

The executor of an executor appointed in substitution for an executor removed by the Court, is not by virtue of such appointment executor of the original testator's estate.

Whether the removal is made by the Surrogate Court or the High Court, provision is made for notice to the Surrogate Clerk and the Surrogate Registrar.

Sections 66 and 67 of the Surrogate Courts Act also deal with the removal of executors and administrators where the amount of the property left by the testator or intestate does not exceed \$1,000.

They are as follows:—

66. (1) The Surrogate Court by which the grant of probate or letters of administration was made shall, where the entire estate left by the testator or intestate does not exceed \$1,000, have the like authority for the removal of an executor or administrator as is by section 39 of the Judicature Act conferred upon the High Court, but nothing in this section contained shall affect the jurisdiction of a Surrogate Court to revoke a grant of probate or of letters of administration in any case where prior to the 7th day of April, 1896, it possessed such authority.

(2) Where the executor or administrator removed is not a sole executor or administrator the Court need not, unless it sees fit, appoint any person to act in the room of the person removed,

and if no such appointment is made the rights and estate of the executor or administrator removed shall pass to the remaining executor or administrator as if the person so removed had died. 59 Vict. ch. 20, sec. 1.

(3) Subject to rules made under this Act, the practice in the Surrogate Courts under this section shall be the same as nearly as may be as the practice in force in respect of proceedings for the revocation of grants of probate. 59 Vict. ch. 20, sec. 2.

(4) The executor of any person appointed an executor under this section shall not by virtue of such executorship be an executor of the estate of which his testator was appointed executor under this section, whether such person acted alone or was the last survivor of several executors. 59 Vict. ch. 20, sec. 3.

67. A certified copy of the order of removal shall be filed with the Surrogate Clerk and another copy with the Registrar of the Surrogate Court by which probate or administration was granted, and such officers shall at or upon the entry of the grant in the registers in their respective offices make in red ink a short note giving the date and effect to the order and shall also make a reference thereto in the index of the register at the place where such grant is indexed. 59 Vict. ch. 20, sec. 4.

In *Mitchell v. Mitchell*, 16 S.C.R. 722, an action for the removal of an executor, of whom there were several, there was litigation pending between the executor sought to be removed, and the estate, and there was also evidence of irregularities in his administration, but not exhibiting any incapacity or dishonesty. The Supreme Court affirmed the decision of the Court of Queen's Bench for Lower Canada, 3 Q.B. 191, that there was no sufficient cause for his removal. But in *Donahue v. Donahue*, 33 S.C.R. 134, the Supreme Court decided that it had not jurisdiction to hear a similar appeal.



## CHAPTER XXXV.

### ANCILLARY GRANTS AND RE-SEALING GRANTS.

A foreign grant of probate or administration gives no authority to deal with assets in this country. It is true that *mobilia sequuntur personam*, but the principle is only given effect to through a representative regularly appointed by the proper Surrogate Court, in the Province where the personal property is situated.

The principal administration is that which is granted by the Courts of the country where the testator or intestate had his domicile. The Courts of that country determine the validity of the will, its construction, the persons who are appointed executors, and their right to the office, as well as the final distribution of the estate. For in every case the succession to personal property is regulated, not according to the law of the country where such property chances to be, but according to the law of the domicile.

Any administration which is granted in any other country is in its nature ancillary.

It is the province of the Court to which the application is made, to determine what is the place of domicile of the deceased, and having decided upon the evidence what the domicile of the deceased is, to decide upon the law of that country the validity of the will, as to execution, the capacity of the testator, and all other questions arising in regard thereto. The Court follows the decisions of the Court of the domicile, both as to the validity of the testamentary document, and as regards the person entitled to probate: *Hill*, 2 P. & D. 90; *Miller v. James*, 3 P. & D. 4. But if there has been no decision of these questions in the Courts of the domicile, the Surrogate Court must determine them for itself, upon the evidence of experts shewing what the law of the domicile is.



The Court has no power to grant probate of any foreign will unless it is *prima facie* satisfied by some document or another that such will has been recognized as valid by the foreign Court; or unless it is proved a valid will according to the law of the place where the testator was domiciled: *De Vigney*, 34 L.J.P.M. & A. 58.

The foreign grant made in the domicile of the deceased will be adopted as the foundation of the grant here, and though the person to whom it is made may not be entitled under our law, yet the question of his right is precluded by the foreign grant in the country of his domicile: *Hill*, 2 P. & D. 90; *Miller v. James*, 3 P. & D. 4.

The practice is to file an exemplification of the original letters probate or letters of administration under the seal of the Court out of which they issued. The Surrogate Court, upon proof of the domicile of the deceased, will accept the exemplification as the foundation of ancillary letters probate or letters of administration. In all other respects, the proceedings are the same as upon an ordinary application.

But since 1888, in Ontario, and 1892, in England, legislation has enabled the Courts, in many instances, to dispense with ancillary grants, and to effect the same result by re-sealing the original probate or letters of administration.

The Colonial Probates Act, 1892, provides for the sealing in the United Kingdom of letters probate and letters of administration which have been granted by the Court of Probate or other Court having jurisdiction in British possessions to which that Act has been applied by Order in Council. Such letters probate or letters of administration when so sealed have the same force, effect and operation in the United Kingdom as if regularly granted there.

Orders in Council have been made applying the Act to Ontario, Manitoba, British Columbia, the North-West Territories and Nova Scotia, also to Cape Colony, New South Wales, Victoria, Western Australia, South Australia, Queensland, New Zea-

land, Tasmania, Gibraltar, British Honduras, Hong Kong, British Guiana, Strait Settlements, Bahama Islands, Barbadoes, Jamaica, Falkland Islands, the Leeward Islands, St. Helena, and several other possessions. The text of the Act is as follows:—

## 55 VICTORIA.

### CHAP. 6.

An Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions.

[20th May, 1892.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the Courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

2. (1) Where a Court of Probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

(2) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied:—

(a) That probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(b) In the case of letters of administration that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate;

and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3) The Court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

(5) Rules of Court may be made for regulating the procedure and practice, including fees and costs, in Courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

3. This Act shall extend to authorize the sealing in the United Kingdom of any probate or letters of administration granted by a British Court in a foreign country, in like manner as it authorizes the sealing of a probate or letters of administration

granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications.

4. (1) Every Order in Council made under this Act shall be laid before both Houses of Parliament as soon as may be after it is made, and shall be published under the authority of Her Majesty's Stationery Office.

(2) Her Majesty the Queen in Council may revoke or alter any Order in Council previously made under this Act.

(3) Where it appears to Her Majesty in Council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for Her Majesty to direct by Order in Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

5. This Act when applied by an Order in Council to a British possession shall, subject to the provisions of the Order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

6. In this Act—

The expression "Court of Probate" means any Court or authority, by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the County of Edinburgh:

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively:

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted:



The expression "British Court in a foreign country" means any British Court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892.

The rules and orders which had been made under that Act were approved and came into effect on the seventh day of December, 1892. The rules and forms prescribed thereunder are as follows:—

Additional rules and orders for the Registrars of the principal Probate Registry in non-contentious business for carrying out the provisions of the Colonial Probates Act, 1892.

92. Application to seal a grant of probate or letters of administration or copy thereof under the Colonial Probates Act, 1892, may be made in the principal Probate Registry by the executor or administrator or the attorney (lawfully authorized for the purpose) of such executor or administrator, either in person or through a solicitor.

93. Such application must be accompanied by an oath of the executor, administrator or attorney in the form in the appendix, or as nearly thereto as the circumstances of the case will allow.

94. The Registrars are to be satisfied that notice of such application has been duly advertised. (Form of advertisement in Appendix.)

95. On application to seal letters of administration the administrator or his attorney shall give bond (in the form set out in the appendix) to cover the personal estate of the deceased within the jurisdiction of the Court. The same practice as to sureties and amount of penalty in bond is to be observed as on application for letters of administration.

96. Application by a creditor under section 2, sub-section 3 of the Colonial Probates Act, is to be made by summons before



one of the Registrars, supported by an affidavit setting out particulars of the claim.

97. In every case, and especially when the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant, the Registrars may require further evidence as to domicile.

98. If it should appear that the deceased was not at the time of death domiciled within the jurisdiction of the Court from which the grant issued, the seal is not to be affixed unless the grant is such as would have been made by the High Court of Justice in England.

99. The grant [or copy grant] to be sealed, and the copy to be deposited in the Registry must include copies of all testamentary papers admitted to probate.

100. When application to seal a probate or letters of administration is made after the lapse of three years from the death of the deceased the reason of the delay is to be certified to the Registrars. Should the certificate be unsatisfactory the Registrars are to require such proof of the alleged cause of delay as they may think fit.

101. Special or limited or temporary grants are not to be sealed without an order of one of the Registrars.

102. Notice of the sealing in England of a grant is to be sent to the Court from which the grant issued.

103. When intimation has been received of the resealing of an English grant, notice of the revocation of, or any alteration in such grant is to be sent to the Court by whose authority such grant was resealed.

104. The affidavit for inland revenue, pursuant to the Customs and Inland Revenue Acts, 1880 and 1881, shall be transmitted to the Commissioners of Inland Revenue as if the person who applied for sealing under the Colonial Probates Act, 1892, were a person applying for probate or letters of administration.

105. The affidavit for inland revenue and accounts and schedules forming part thereof shall be in such form as may be prescribed by the Commissioners of Her Majesty's Treasury.

(NOTE.—The affidavit to be used will in fact be Form A. with some few modifications to suit the circumstances.)

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Forms (Colonial Probates Act, 1892).

*Oath.*

In the High Court of Justice, Probate, Divorce and Admiralty  
Division (Probate).

In the goods of A.B., deceased.

I, C.D. (or E.F.), of                      make oath and say :

1. That a grant of probate of the will (or letters of administration of the personal estate) of A.B., late of                      , deceased, was granted to me (or C.D.)                      by the                      Court at  
on                      the                      day of                      .

2. That the said deceased was, at the time of his death, domiciled at                      , [*the following words to be struck out if inapplicable*] within the jurisdiction of the said Court.

3. That the notice hereunto annexed was inserted in the "Times" newspaper on the                      day of                      .

4. That I am the attorney lawfully appointed of C.D. under his hand and seal, and am duly authorized to apply to this Court for the sealing of the said grant. [*This paragraph to be struck out if inapplicable.*]

5. That the value of the personal estate in England amounts in value to the sum of                      and no more, to the best of my knowledge, information and belief.

Sworn, etc.

*Advertisement.*

A.B., deceased.

Notice is hereby given that after the expiration of eight days application will be made to the principal Probate Registry of the High Court of Justice for the sealing of the probate of the will (or letters of administration of the personal estate) of A.B., late of \_\_\_\_\_, deceased, granted by the \_\_\_\_\_ Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_.  
Solicitors for

*(To be advertised once in the "Times" newspaper unless otherwise directed by one of the Registrars.)*

*Administration Bond (with or without will)*

Know all men by these presents, that we, A.B., of \_\_\_\_\_, C.D., of \_\_\_\_\_, and E. F., of \_\_\_\_\_, are jointly and severally bound unto G.H., the President of the Probate, Divorce and Admiralty Division of Her Majesty's High Court of Justice, in the sum of \_\_\_\_\_ pounds, of good and lawful money of Great Britain, to be paid to the said G. H., or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and ninety.

The condition of this obligation is such that if the above named A.B., the administrator (with the will dated the \_\_\_\_\_ day of \_\_\_\_\_, annexed), by authority of the \_\_\_\_\_ Court at \_\_\_\_\_, acting under letters of administration granted to \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, and now about to be sealed in England under the Colonial Probates Act, 1892, of the personal estate of K.L., late of \_\_\_\_\_, deceased, who died on

the                    day of                    , 18                    , do, when lawfully called on in that behalf, make, or cause to be made, true and perfect inventory of the personal estate of the said deceased in England which has or shall come to                    hands, possession or knowledge, or into the hands and possession of any other person for                    , and the same so made do exhibit, or cause to be exhibited, into the principal Probate Registry of Her Majesty's High Court of Justice, whenever required by law so to do, and the same personal estate do well and truly administer according to law; and further do make, or cause to be made, a true and just account of                    said administration, whenever required by law so to do, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, Sealed and Delivered  
by the within-named  
in the presence of

}

A Commissioner for oaths.

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*Administration Bond (with or without will) on application by Attorney.*

Know all men by these presents, that we, A.B., of                    , C.D., of                    , and E.F., of                    , are jointly and severally bound unto G.H., the President of the Probate, Divorce and Admiralty Division of Her Majesty's High Court of Justice, in the sum of                    pounds, of good and lawful money of Great Britain, to be paid to the said G. H., or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the

Sealed with our seals.

The condition of this obligation is such, that if K.L., of \_\_\_\_\_, the administrator (with the will dated the \_\_\_\_\_)

Signed, Sealed and Delivered )  
by the within-named  
in the presence of

In Ontario the procedure relating to ancillary probate and letters of administration is governed by sections 78 and 79 of the Surrogate Courts Act, which are as follows:—

“78. Where any probate or letters of administration or other legal document purporting to be of the same nature, granted by



a Court of competent jurisdiction in the United Kingdom, or in any province or territory of the Dominion, or in any other British province, is produced to, and a copy thereof deposited with, the Registrar of any Surrogate Court of this province, and the prescribed fees are paid as on a grant of probate or administration, the probate, or letters of administration or other document aforesaid, shall, under the direction of the Judge, be sealed with the seal of the said Surrogate Court, and shall thereupon be of the like force and effect in Ontario, as respects personal estate only, as if the same had been originally granted by the said Surrogate Court of this province, and shall (so far as regards this province) be subject to any orders of the last-mentioned Court, or on appeal therefrom, as if the probate or letters of administration had been granted thereby. 51 V. c. 9, s. 1(1)."

"79. The letters of administration shall not be sealed with the seal of the said Surrogate Court until a certificate has been filed under the hand of the Registrar of the Court which issued the letters, that security has been given in such Court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such Court as the assets within Ontario, or in the absence of such certificate until like security is given to the Judge of the Surrogate Court covering the assets in Ontario as in the case of granting original letters of administration. 51 V. c. 9, s. 1(2)."

(Proclamation bringing 51 V. c. 9 into full force published in Gazette, 27th May, 1893. For order of Her Majesty in Council applying the Colonial Probates Act, 1892, to the Province of Ontario, and for rules under that Act, see Statutes of Ontario, 1895, page x.)

In Manitoba the corresponding enactment is contained in sections 87 and 88 of the Surrogate Courts Act, being page 41 of the Revised Statutes of Manitoba, 1902. It is to be observed, however, that the Ontario statute limits the operation of ancillary probate and letters of administration to personal estates only, while in Manitoba there is no such limitation. In that

province, by section 24 of the Surrogate Courts Act, probate or letters of administration, by whatever Court granted, have effect over the real and personal estate of the deceased in all parts of Manitoba.

In the North-West Territories, now the Provinces of Alberta and Saskatchewan, section 490 of the Judicature Ordinances, being page 21 of the Consolidated Ordinances, 1899, contains a provision identical with that of Manitoba. In all of the provinces the prescribed fees are required to be paid before the grant is resealed. In order to determine the amount of the prescribed fees, it would be necessary to file an affidavit of the value of the property with inventories and valuations.

In Ontario no rules or forms have been prescribed for proceedings upon resealing grants under the Act.

Where a colonial grant has been made to more than one person, it cannot be resealed in England on the application of one of the grantees without the authority and consent of the others.

If a colonial grant be made to two or more executors, one of whom is dead at the time of the application being made to reseat the probate, the attorney of the surviving executors must in his oath swear to the death of the deceased executor. They will appear in the documents as the "now surviving executors" of the will: Tristram & Coote, 13th ed., p. 266.

In England the application to reseat a colonial grant may be made by an attorney of the executors or administrators, lawfully authorized for that purpose, and the attorney may make the affidavit required.

Notice of the intention to apply for the resealing must be advertised in the Times newspaper, and proof of the advertisement furnished by affidavit.

In the Canadian provinces the statutes require that the probate, letters of administration, or other legal document of that nature, to be resealed, shall have been granted by a Court of competent jurisdiction. It may be observed that a grant of probate or administration by the Court of some other country or province is not conclusive evidence of the domicile, if that question

is raised here. Even under the English Act, the Scotch confirmation, corresponding under Scotch law to the grant of probate, is not conclusive evidence of the domicile: *Hawarden v. Dunlop*, 2 Sw. & Tr. 340.

Where confirmation of the executor of a person who was domiciled in Scotland has been sealed with the seal of the Court of Probate in England, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds, though they are specifically bequeathed, and although by the law of Scotland, an executor cannot deal with leasehold property in that country: *Hood v. Barrington*, L.R. 6 Eq. 218. See also *Ewing*, 6 P.D. 19.

The resealing must be of letters probate, letters of administration, or other legal document purporting to be of the same nature. The Persian law called the "Sharâ" does not permit either the original will or any copy of it to go out of the possession of the Court, nor is there any publication of the contents by the Court, except to and in the presence of the legatees and heirs. There is nothing analogous to probate or administration known in Persia, except certain documents given by the Court, under the hand and seal of its officer, to each of the legatees, specifying what has been left to him. The legatees do not take by representation, but directly from the testator by the decree of the Court. Upon an application by a legatee to whom funds in the Bank of England were left, for administration with or without the document given him by the Persian Court, he was granted administration in England limited to the property mentioned in the document in question: *Dost Aly Kahn*, 6 P.D. 6. It would seem that the writing under seal in that case did not in any way constitute a legal document of the same nature as probate or letters of administration. A will executed by a person domiciled in the Province of Quebec, before two notaries, in accordance with the Quebec law, but not proved before any Court in Quebec, cannot be resealed in Ontario: *In re McLaren*, 22 A.R. 18.

The ordinary fees are to be paid as upon a grant of probate or administration. The Court must, in order to determine the

amount of the fees, have evidence of the amount of the personal property. If resealing of letters of administration is sought, the amount of the security may require to be fixed.

The language of the statutes in the various provinces implies that what is done in resealing is not the making of a grant by the Court which reseals, but the endorsation by that Court of a grant made by a Court in the United Kingdom, some other province of Canada, or other British province, so as to give to the original grant the same force and effect in the province in which it is resealed as if it had originally been granted by the Court resealing it. The probate, letters of administration, or other legal document of the like nature, is thereafter, so far as concerns property within the province, subject to any orders of the Surrogate Court which resealed it, or on appeal therefrom, as if the probate or letters of administration had been granted thereby.

The inspector of legal offices, in his report for 1895, made the following observations upon the practical working out of these provisions: "At first sight it would seem that the production of the original probate or letters of administration, and the deposit of a copy, with the payment of the necessary fees, are the only acts required to entitle the applicant to have the seal of the Court applied to affixed by the Registrar to the probate or letters of administration. But this act of the Registrar can only be done under the direction of the Judge, which, of course, cannot be given until all necessary facts are made known. I have suggested, as a safe practice to be adopted, to require the applicant to petition the Court, and that notice be given to the Surrogate Clerk and his certificate obtained, as in ordinary cases. An affidavit of the value, and an inventory of the personal property in Ontario, and a verified copy of the probate or letters of administration should be filed. In an administration case, in the absence of the certificate mentioned in sub-section 2 of sub-section 1 of the Act (now section 79), security shall be taken in the same way as in other cases of administration. The substance of the order of the Judge should be endorsed on the original probate or letters of administration, and authenticated by the Regis-



trar under the seal of the Court. The fees to be charged will be the same as in other cases under the tariff, and the probate or letters of administration, bonds and Judge's order are to be copied at length in the proper registers."

Where grants are resealed, the deceased was almost invariably resident, and usually was domiciled, abroad. If the application was for ancillary probate or administration in the strict sense of that term, and not for the resealing of a grant already made in some other jurisdiction, the usual notice of the application by advertisement in the *Ontario Gazette* would be requisite under section 39 of the Surrogate Courts Act.

As the original grant is merely resealed, and no letters probate or letters of administration are issued out of the Court which reseals, it may be open to question whether there is any rule requiring the various affidavits and schedules prescribed under the Succession Duty Act, to be filed.

It is suggested that the practice in regard to advertisement in the *Gazette*, and to succession duty, should be the same as if an original grant was being made, and that the following documents should be filed:

- (1) Petition of the executor or administrator for the resealing of the original grant.

- (2) The original probate or letters of administration, or an exemplification thereof.

- (3) A copy of the same duly verified by affidavit.

- (4) The executor's oath.

- (5) An affidavit of the value of the property within the province.

- (6) An inventory of the personal property therein.

- (7) In the case of administration, the certificate of the Registrar of the Court which issued the letters, that security has been duly given for the personal property within the province, or in the alternative, the bond required by section 79 of the Act.

- (8) Proof of advertisement in the *Ontario Gazette*.

- (9) The usual affidavits and schedules relating to succession duty.



## CHAPTER XXXVI.

### CUSTODY AND GUARDIANSHIP OF INFANTS.

At common law the father was entitled to the custody of his infant children. He is their guardian by nature and by nurture. That right, however, was not absolute and unqualified. If the Court was satisfied that the father had so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential to their safety or welfare, that the father's rights should be interfered with, it had jurisdiction, apart from statute, to deprive him of the guardianship of his children: *Re Fynn*, 2 De G. & Sm. 457. It had to be shewn that either he was unfit to be the custodian of the child, or that his so remaining would be an injury to the child: *In re Taylor*, 4 Ch. D. 157.

The father's rights were modified in England by Talfourd's Act, 2 & 3 Viet. ch. 54, which gave the Court a very large discretion as to the custody of children under seven years of age. Within that age the Court had absolute control over the children, without regard to the peculiar common law right of the father to the custody of all his children. In determining the strength of the relative claims of the father and the mother to the custody of the children, the Court will adopt that course which seems best for the interests of the children, and where one child is within the prescribed age, and is removed from the father's custody, the custody of the other children will also be given to the mother to avoid the separation of the children: *Warde v. Warde*, 2 Ph. 786.

In England the Custody of Infants Act, 1873, 36 & 37 Viet. ch. 12, increased the statutory age within which the Court had a discretion to commit the custody of the infants, to either parent, to sixteen years. This power was extended by the Guard-

ianship of Infants Act (Eng.), 49 & 50 Vict. ch. 27, from which sub-section 1 of section 1 of the Ontario Act is copied.

In determining whether the custody of an infant child ought to be given to the mother or retained by her, the Court would, under 36 & 37 Vict. ch. 12, take into consideration three things: the paternal right, the marital duty, and the interest of the child. For this purpose the marital duty includes, not only the duty which the husband and wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care and affection of both father and mother. If the father has committed a breach of the marital duty as thus defined, and it appears that it is in the interest of the children to live with the mother, their custody will be given to her: *In re Elderton*, 25 Ch. D. 220; *In re Halliday's Estate*, 17 Jur. 56; *In re Taylor*, 4 Ch. D. 157.

In Ontario an Act somewhat similar to Talfourd's Act was in operation until 1887, the age within which the Courts had a discretion to control the custody of the child was fixed at twelve years.

The present Act, R.S.O. 1897, ch. 168, sec. 1, sub-sec. 1, is copied from the English Guardianship of Infants Act, 49 & 50 Vict. ch. 27, sec. 5, and is as follows:

#### *Custody of Infants.*

1. (1) The High Court, or Surrogate Court, or any Judge of either Court, may, upon the application of the mother of an infant (who may so apply without next friend), make such order as the Court or Judge sees fit regarding the custody of the infant, and the right of access thereto of either parent having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may afterwards alter, vary or discharge the order on the application of either parent, or after the death of either parent, or any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father

for the same, or otherwise as to costs as the Court or Judge may think just.

Power is given to “make such order as the Court or Judge sees fit regarding the custody of the infant.” Like every other power given to a Judge, this discretion of the Judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons: *In re Taylor*, 4 Ch. D. 157.

The power conferred by the section may be exercised by the Surrogate Court or a Judge thereof, as freely as by the High Court or one of its Judges.

The custody of the infant and the right of access thereto of either parent, are the special subjects in regard to which the power is conferred.

Three considerations are to weigh with the Court in making the order: (*a*) the welfare of the infant; (*b*) the conduct of the parents, and (*c*) the wishes as well of the mother as of the father.

Power is reserved to afterwards alter, vary or discharge any order made: (*a*) on the application of either parent; (*b*) on the death of either parent, and (*c*) on the death of the guardian appointed under the Act; and jurisdiction is given over costs.

This section has materially extended the rights of mothers. It is now impossible to say that the rights of the father are to be the first consideration of the Court. Regard must be had to the conduct of the parties, and these words cannot be cut down in such a way as to confine them to such conduct on the part of the father as before the Act would have been sufficient to deprive him of his rights. “That would be to make them of no effect, because conduct of that kind was taken into consideration by the Court as long as it had to deal with such matters. As to the conduct of the parents, it appears to me that you have to take into consideration on each side the whole conduct—that is to say, not to treat the parents in an unequal manner, and say there are some things on the part of the mother which we should consider decisive, and these same matters on the part of the father are to

be neglected altogether. The section does not say 'having regard to the decided cases and the difference between a father and a mother,' but they are put on an equality; and I think the Court is bound to take into consideration every circumstance of conduct on the part of the father that it would consider on the part of the mother": *In re A. & B.* (1897), 1 Ch. D. 786; *Re Young*, 29 O.R. 665.

The Court will in a proper case give the mother the custody of her infant children, notwithstanding that she may have been guilty of matrimonial misconduct. And the order may be that each parent shall have their custody for six months of the year: *Ib.*

Where a father has done no wrong, and is able and willing to support his wife and child, the Court will not take away from him the custody of his infant child, even though of tender years, merely because the mother has left him without any cause other than that she was tired of living in the country to which he had taken her, even though residence with the mother may be more beneficial for the child than residence with the father. It must be the aim of the Court not to lay down a rule which will encourage the separation of parents who ought to live together and jointly take care of their children. The discretion given to the Court by the statute is to be exercised as a shield to the mother where a shield is required against a husband with whom she cannot reasonably be required to live; but it is not to be exercised as a weapon to compel the unoffending husband to live where his wife sees fit: *Re Mathieu*, 29 O.R. 546.

The father of two infants, aged five years and three years, was a man of drunken habits and evil conversation, and had beaten and ill-treated his wife so that she was justified in leaving him. The children could be supported in the custody of the mother, who was a sober and moral woman. Having regard to the conduct of both parties, and the welfare of the children, the custody was given to the mother: *Re Dickson*, 12 P.R. 639.



Under the powers given by this section, the Court will, in a proper case, enforce the decree of a foreign court in regard to the custody of the child of parents domiciled within the jurisdiction of, and divorced by, that foreign court: *Re Davis*, 25 O. R. 579. See also *In re Kinney*, 6 P.R. 245.

In *Re Young*, 29 O.R. 695, the Court overlooked the English Act, 49 & 50 Vict. ch. 27, sec. 5, and assumed that 36 & 37 Vict. ch. 12, was still in force there. This gave rise to remarks on the difference between the English law and the law of Ontario, which were said to be essentially different. The view the Court took as to the meaning of this section agrees with the English decisions on the same statute. "The Act recognizes the maternal right as well as the paternal right, and requires equal regard to be paid to the wishes of the mother as to those of the father."

The Court will not divide the custody and separate the children, and if it is for the benefit of some of the children, by reason of their tender years, that they should be in the custody of the mother, all the children will be given to her: *Warde v. Warde* (1849), 2 Ph. 786; *Re Elderton* (1883), 25 Ch. D. 220; *Smart v. Smart* (1892), A.C. 425; *Re Young* (1898), 29 O.R. 665.

The power to rescind any order will be exercised with regard to the same considerations as prevail in the making of the order. When the mother to whom the custody of the child has been given, is no longer a fit person to have its custody, and the father from whom the mother had obtained a divorce by reason of his adultery, has married again and is leading a respectable life, the former order may be rescinded and the child transferred to the care of the father: *Witt v. Witt* (1891), P. 163.

The application to the Surrogate Court would be made summarily upon notice, and the proceedings are, if opposed, contentious. The direction of the Judge under contentious Rule 8, and sections 22, 23, and 28 of the Surrogate Courts Act, will determine the procedure. He may have issues of fact tried by a jury, or he may determine the questions on affidavits on which the deponents are cross-examined and re-examined before him.



The Surrogate Court Rule relating to guardians and infants, Rule 1, provides that: "In all matters and applications touching or relating to . . . the custody or control of, or right of access to, infants, the maintenance of infants, or otherwise, the practice and procedure in the Surrogate Courts shall conform as nearly as the circumstances of the case will admit to the practice and procedure of the said Courts in respect to application for, and grants of, probate and administration."

The form of order made in *Re A. & B.* (1897), 1 Ch. 786, is as follows:—

"This Court doth order that the custody of the said infants be committed until further order to the applicant and respondent each for six months in the year, at times to be agreed upon between them, and in default of any agreement, as the Judge in Chambers shall direct, the applicant and her father by their counsel respectively undertaking that while the said infants are in the custody of the applicant they shall be accompanied by their governess, and shall be well cared for, educated, clothed and maintained at the expense of the applicant and her father. And the respondent and his father by their counsel respectively undertaking that while the said infants are in the custody of the said respondent they shall be accompanied by their governess, and shall be well cared for, educated, clothed and maintained at the expense of the respondent and his father, the expense of the governess to be borne in equal moieties between the applicant and her father and the respondent and his father. And the applicant and her father by their counsel undertaking that in case at any time while the said infants are in the custody of the applicant she shall not be residing with her parents, she will have to live with her a suitable lady relation, friend or companion. And it is ordered that all reasonable access be allowed to either the applicant and respondent while the said infants are in the custody of the other. Liberty to apply."

If a father has not so acted as to alter the expectations and fortune of his child, he will be allowed to rescind and abandon

any agreement for surrendering the custody of his child that he may have made: *Hill v. Gomme*, 8 L.J. Ch. 350. But if a legacy has been left him on condition that he surrender the custody of his child to guardians appointed by the testator, he must renounce the legacy if he will not comply with the conditions: *Potts v. Horton*, 3 P. Wms. 110*n*. When the parent permits his children to be brought up with expectations founded upon their custody, and to be maintained and educated in a way beyond the father's means, he is not at liberty to say that they shall be taken from the opportunities thus afforded them: *Lyons v. Blenkin*, Jac. 245; *Roberts v. Hall*, 1 O.R. 388.

Illegitimate children cannot have a testamentary guardian appointed to them under 12 Car. II. ch. 24: *Sleeman v. Wilson*, L.R. 13 Eq. 36. The mother of an illegitimate child is entitled to its custody, even as against the putative father: *Ex parte Knee*, 1 B. & P. 148. If he obtains possession of it by force or fraud, she may recover it on *habeas corpus*: *Rex v. Moseley*, 5 East. 224(*u*); *Rex v. Soper*, 5 T.R. 278. But it is otherwise if she has parted with the child by agreement with the putative father: *Regina v. Armstrong*, 1 P.R. 6; or if she has abandoned the child, or placed it in the care or under the protection of others, and afterwards seeks to claim it: *In re Holleshed*, 5 P.R. 251. But the father has the right to its custody and care, except as against the mother, and she has the right as against the father: *O'Rourke v. Campbell*, 13 O.R. 563.

The wishes of the mother of an illegitimate child as to its custody are primarily to be considered. Where, therefore, it was shewn that it would not be detrimental to the interest, but for the benefit of such a child that it should be placed in a particular educational institution chosen by the mother, the Court held that her wishes in regard thereto should prevail over the desires of persons in whose custody the child had been for some time: *Rex v. New* (1904), 20 T.L.R. 583.

The authority of the father to determine the religious faith

in which his child is to be educated is not changed by the Act: *Re Scanlon*, 40 Ch. D. 200.

The indifference of the father regarding the religion in which his children are to be brought up is a circumstance to be taken into account after his death in determining whether they shall be brought up in accordance with his religious views or otherwise: *In re McGrath* (1893), 1 Ch. 143; *Hawksworth v. Hawksworth*, L.R. 6 Ch. 545. The law is not so rigid as to compel the Court to order children to be brought up in the religion of their deceased father, regardless of the consequence to themselves: *In re Clarke*, 21 Ch. D. 817; *In re Nevin* (1891), 2 Ch. 299. The welfare of the infant is the ultimate guide of the Court: *In re Agar Ellis*, 24 Ch. D. 317. The Court will not interfere with the father's rights over his child, who is a ward of Court, except (1) where by his moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority: *Ib.*

Promises made by the father before marriage to bring the children up in the religion of the mother are not sufficient to deprive him of the right to determine the religion in which the children shall be brought up: *In re Agar Ellis*, 10 Ch. D. 49; *In re Meades*, Ir. L.R. 5 Eq. 98.

The Court has jurisdiction to prevent the religious convictions of the child from being interfered with, even at the instance of the father or by his authority: *In re Newton* (1896), 1 Ch. 740; *Andrews v. Salt*, L.R. 1 Ch. 622.

See also *Re Faulds*, 7 W.R. 759.

In *Re McGrath Infants* (1893), 1 Ch. 143, the law as regards the religious training of infants is thus expressed: "As regards religious education it is settled law that the wishes of the father must be regarded by the Court and must be enforced, unless there is some strong ground for disregarding them. The Guardianship of Infants Act, 1886, which has so greatly enlarged the rights of mothers after their husbands' deaths, has not changed the law in this respect . . . The wishes of the father, if not clearly expressed by him, must be inferred from his conduct. If the

father is dead it will be naturally inferred that in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the Court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion, unless it can be shewn to be for the welfare of the child that this rule should be departed from or the father has otherwise directed."

A testamentary guardian who changes his religion after the testator's death from that of the father of the ward to another, may be removed from office on that ground: *F. v. F.* (1902), 1 Ch. 688.

The custody of infant children of a deceased Protestant father had been entrusted by their mother to a Protestant orphanage. The widow married a Roman Catholic of small means, and joined that church. She applied to the Court to regain the custody of her children, but upon its appearing that she intended to bring them up as Roman Catholics, the application was refused: *In re Grey* (1902), 2 Ir. R. 684.

The Court or Judge may also make an order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant is entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father or the value of the estate the Court or Judge thinks just and reasonable: sub-section 2 of section 1.

This sub-section is not in the corresponding English Act. The High Court has always had power to order maintenance out of the infant's property. But the power conferred by this sub-section to order the father to contribute to the maintenance is new.

The Court will not compel a father out of his own moneys to educate a child in a religion different from his own: *In re Violet Nevin* (1901), 2 Ch. 299, 312; *Andrews v. Salt*, L.R. 1 Ch. 622.

In Ontario there is one instance in which the common law



rights of the father have been preserved notwithstanding the terms of section 1. By section 2 of the Act a mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband against any person, is not able to avail herself of the special provisions of the Act for obtaining the custody of her children, and no order can be made by virtue of the Act directing either that she shall have the custody of the infant, or that she shall have access to the infant. This section originated in 18 Vict. ch. 126, sec. 4. There is no corresponding provision in the English Act.

Guardianship by nature was originally an incident of tenure in chivalry; it belonged primarily to the father, but the mother and other ancestors could be guardians also; it only affected the person of the heir, and was based upon the interest of the ancestor in disposing of his heir in marriage. It lasted until the heir attained the age of twenty-one. Guardianship for the cause of nurture vested in the parents, but extended only to the government of the person, and terminated at fourteen.

At common law the father is entitled to the custody of his own children during their infancy, not only as guardian by nurture, but by nature: *Ex parte Hopkins*, 3 P. Wms. 152; *Stileman v. Ashdown*, 2 Atk. 477. The right of the father, except as controlled by the Courts and limited by statute, is absolute, even as against the mother: *Ex parte Glover*, 4 Dowl. 291; even though the child be an infant at its mother's breast: *Re Thomas*, 22 L.J. Ch. 1075. The mother at common law had no absolute right to be guardian of her children, but if there was no other guardian, she was properly chosen guardian as being so by nature and by nurture: *Villareal v. Mellish*, 2 Swanst. 533.

The father being dead and not having disposed of the guardianship, it devolves upon the mother, and at common law is not assignable. The mother's right continues notwithstanding her second marriage: *Ib.*

But, apart from statutes of recent date, it was only when the father had not appointed a guardian that the mother succeeded



to the office. To supply the loss of feudal protection to infants, upon the abolition of feudal tenure, 12 Car. II. ch. 24, was passed. R.S.O. 1897, ch. 340, secs. 2-3.

Since the Wills Act (1837), an infant cannot make a valid will. The appointment by deed, when made, may be revoked by a subsequent will: *Ex parte Earl of Ilchester*, 7 Ves. 348. The father was the only person who had power to make an appointment under this statute. A grandfather could not make an appointment under this statute: *Blake v. Leigh*, Amb. 306; nor a stranger: *Powell v. Cleaver*, 2 Bro. C.C. 500; nor a guardian already appointed, nor the mother: *Ex parte Edwards*, 3 Atk. 519.

Testamentary guardians derive their appointment from the parental appointment; and do not require any further qualification, not even probate of the will by which they are appointed: *Gilliat v. Gilliat and Hatfield*, 3 Phillim. 222. Indeed, if the document only appoints a testamentary guardian without appointing executors or disposing of property, it was not entitled to probate before the Wills Act, sec. 1: *Marlow*, 3 Sw. & Tr. 422.

But if there are any doubts as to the due execution and validity of the appointment, an issue may be directed to be tried by a jury: *In re Andrews*, L.R. 9 Q.B. 153. No particular form of words is necessary, if in writing, provided the intention to create a guardianship is manifest. But as it is a deed it must be under seal: *Re Chillman*, 25 O.R. 268.

A testamentary guardian can only be appointed of children under twenty-one years of age and unmarried at the time of the testator's death. The marriage of the infant does not, at least in the case of males, terminate the wardship: *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; and perhaps in the case of females also. The testamentary guardian is entitled to the custody of the ward's person, and property; and apart from the Act Respecting Infants, R.S.O. 1897, ch. 168, his right to the custody and control of the infant's person is superior to that of the mother.

The testamentary guardian stands *in loco parentis*: *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103, and when three are appointed as testamentary guardians without any words importing survivorship, yet on the death of two, the survivor shall be guardian: *Ib.*

The testamentary guardian has the custody and tuition of the child, the profits of his real property, and the management of his goods, chattels and personal estate, and may bring actions in regard thereto.

A testamentary guardianship is a trust; and therefore the Statute of Limitations does not run against the ward in an action against the guardian for an account: *Mathew v. Brise*, 14 Beav. 341.

But, though testamentary guardians have the legal right to the custody of the personal property of the infant ward, they are not entitled to insurance moneys of the infant payable under sections 155-157 of the Ontario Insurance Act, R.S.O. ch. 203, though the guardian appointed by a Surrogate Court is within their provisions: *Campbell v. Dunn*, 22 O.R. 98.

A writ of *habeas corpus* will issue at the instance of the testamentary guardian, commanding the return to him of his ward, and an order will be made upon its return for the delivery of the ward into his custody: *Re Chillman*, 25 O.R. 268.

The testamentary guardian of an infant is entitled to the rents and profits of the infant's lands, for the infant's benefit during his minority, even though the lands have been devised in strict settlement, the infant being tenant for life, unless the testator has appointed trustees qualified to exercise the powers of section 42 of the Conveyancing and Law of Property Act, 1881: *In re Helyar* (1902), 1 Ch. 391.

The Surrogate Court has, by sections 11-18 of the Act respecting Infants, power to appoint guardians.

The father may be appointed by the Surrogate Court of the county in which the infant resides; or, on the consent of the father, some other suitable person may be appointed. If the in-

fant is fourteen years of age, his consent is, in either case, necessary: Section 11.

The appointment may also be made by the Court, though there be no father living, and no other legal guardian: *Ib.*

Letters of guardianship granted by any Surrogate Court have effect in every part of Ontario; and the grant is proved by the official certificate of the grant under the seal of the Court: *Ib.*

The appointments and removals of guardians by the Court are to be notified to the Surrogate Clerk in the same way as grants of probate or administration or revocations thereof: *Ib.*

Section 12 provides for the application in writing by the infant or his friend or friends, for the appointment, after twenty days' notice by advertisement in some paper published in the county and in the Ontario *Gazette*, of some suitable and discreet person or persons. By 3 Edw. VII. ch. 7, sec. 31, the power to make the appointment is not dependent upon the infant's having property: Section 12.

It would seem that the advertisement is unnecessary when the applicant is the father or some other suitable person with his consent, under section 11.

Every guardian appointed under sections 11 or 12 must give security by bond in such penal sum, and with such securities, as the Judge directs. The bond must comply with the requirements of section 13.

Section 14 of the Infants Act, R.S.O. 1897, ch. 168, upon the death of the father, constitutes the mother the guardian of the infant. If the father has appointed no guardian, the mother is the sole guardian. If he has appointed a guardian, the mother is guardian jointly with such appointee. If the father has not appointed a guardian, or the guardian appointed by the father dies or refuses to act, the Surrogate Court or Surrogate Judge, or the High Court or a Judge thereof, may appoint a guardian to act jointly with the mother. The section is as follows:—

14. (1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone,

when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

(2) Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the High Court or Surrogate Court, or any Judge of either Court, may from time to time appoint a guardian or guardians to act jointly with the mother as such Court or Judge shall see fit.

By section 15 the mother is given power to appoint a guardian of her infant child, by deed or will, to act upon the death of both parents. If both father and mother appoint guardians they are to act jointly.

The same section empowers the mother to provisionally appoint a guardian, by deed or will, to act after her death jointly with the father. Upon its being shewn to the satisfaction of the Court or Judge that the father is for any reason unfitted to be the sole guardian of his infant children, such provisional appointment may be confirmed, or such other order as seems best to the Court or Judge may be made. The section is as follows:—

“15. (1) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant, after the death of herself and the father of the infant (if the infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

(2) The mother of an infant may, by deed or will, provisionally nominate some fit person or persons to act as guardian or guardians, of the infant after her death jointly with the father of the infant, and the Court or a Judge, after her death, if it be shewn to the satisfaction of the Court or a Judge that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be empowered to act as aforesaid, or make such other order in respect of the guardianship as the Court or Judge shall think right.”

If differences arise amongst the guardians, or with the father,



upon a question affecting the welfare of the infant, any of the guardians or the father may apply to the Court or Judge, and thereupon such orders may be made as to the matters in difference as seem best: Section 16.

Section 17 gives full power and authority to Surrogate Courts and Judges, as well as to the High Court and its Judges, to remove testamentary guardians.

The jurisdiction of the Surrogate Courts in guardianship matters under sections 1, 14, 15, 16 and 17 of the Act is governed by the residence of the infants or of the respondents. See section 18.

The powers of guardians appointed under the Act, whether by letters of guardianship issued out of the Surrogate Court under sections 11 and 12, or sub-section 2 of section 14, and sub-section 2 of section 15, or by the express designation of the statute, as by sub-section 1 of section 14, or sub-section 1 of section 15, are defined by section 19. This statute does not deal with the powers of testamentary guardians appointed by the father under 12 Car. II. ch. 24; but it defines the powers of the testamentary guardians which the mother is empowered by section 14, sub-section 1, and section 15, sub-section 1, to appoint. Section 19 is as follows:—

“19. Unless where the authority of a guardian appointed or constituted under sections 14 or 15 is otherwise limited, the guardian of any infant appointed or constituted under or by virtue of this Act during the continuance of his guardianship,

(1) Shall have authority to act for and on behalf of the said ward;

(2) May appear in any court and prosecute or defend any action in his or her name;

(3) Shall have the charge and management of his or her estate, real and personal, and the care of his or her person and education;

(4) And in case the infant is under the age of fourteen years, may, with the approbation of two of Her Majesty's Jus-

tices of the Peace, and the consent of the ward (or in case the infant is not under the age of fourteen years, then with the consent of the ward only), place and bind him or her an apprentice to any lawful trade, profession or employment; the apprenticeship, in the case of males, not extending beyond the age of twenty-one years, and in the case of females, not beyond the age of eighteen years, or the marriage of the ward within that age. R. S.O. 1887, ch. 137, sec. 18.

There are comparatively few decisions dealing with the powers of testamentary guardians under the Statute of Charles. They were discussed in *McCreight v. McCreight*, 13 Ir. Eq. 314, where an attempt was made to collect from executors money paid to the testamentary guardians of infants, the guardian having died insolvent after misappropriating the money. The judgment of the Lord Chancellor contains an exhaustive discussion of the law and the authorities. He founds part of his argument on the right of action which he holds to extend to the personal estate, notwithstanding the reference in the statute to such action as a guardian in socage might bring, and he concludes thus: "Upon the whole of the case it appears to me, and I cannot say that I entertain any serious doubt on it, that this guardian, deriving his authority from the will of the testator, was entitled by the force of the power and authority given by the statute to such a guardian, to give a discharge for the general personal estate of the infants, and I think the fund in question here is not stamped with any character which distinguishes it from general personal estate, or withdraws it from the operation of the same principle."

The statute, 12 Car. II. ch. 24, sec. 9, gives testamentary guardians powers quite as large as are given by the statute to a guardian appointed by the Surrogate Court in regard to the care and management of estates real and personal of the infant ward: *Mitchell v. Richey*, 13 Gr. 445. See also *Eyre v. Countess of Shaftesbury*, 2 White & Tudor's Leading Cases 693.

In *Huggins v. Law*, 14 A.R. 383, the rights and powers of guardians appointed under R.S.O. 1897, ch. 168, were much dis-

cussed. The right of the guardian appointed by the Surrogate Court, to receive and give a valid discharge to the executor for personal property bequeathed to the infants of whom he has been appointed guardian, was affirmed. It was said to be beyond question that although the guardian would, under this statute, be driven to sue in the infant's name to recover from a stranger property to which the infant is entitled, the property when recovered would remain under the charge and management of the guardian; and if that property so recovered consisted of farming stock or perishable property, it would be proper for him to convert it into money, with the view to performing the duties of his position and providing for the maintenance and education of his wards. The statutory guardian is entitled to the possession of all the property in which the infant is interested, and for which by law, or express contract or other provision, no other custody has been provided. See also *Genet v. Tallmadge*, 1 Johns. Chy., N.Y. 3; *Morell v. Dickey*, 1 Johns. Chy. 153.

It would be otherwise if the executors had a specific direction in the will to keep the money in a savings bank or make some other specific disposition of it until the children came of age: *Galbraith v. Dunscumb*, 28 Gr. 27.

The guardian of an infant appointed under R.S.O. 1897, ch. 168, has power to lease the lands of the infant during the minority of the infant, but not beyond that period. The guardian is a trustee of the lands for the infant during his minority, and cannot acquire title to them by possession, but upon the majority of the infant, the guardian's possession changes its character, and becomes that of a stranger, and the Statute of Limitations thereafter runs against the infant: *Clarke v. MacDonnell*, 20 O.R. 564; *Hickey v. Stover*, 11 O.R. 106. The view expressed in *Switzer v. McMillain*, 23 Gr. 538, was rejected in *Clarke v. MacDonnell*, ante, as being overruled by *Huggins v. Law*, 14 A.R. 383; *In re Helyar* (1902), 1 Ch. 391.

A guardian appointed by a Surrogate Court might bring

ejectment to try the infant's title: *Doe d. Atkinson v. McLeod*, 8 Q.B. 344.

But he cannot effectually consent to the rescission of a promise to marry the infant ward, so as to release the prospective husband. The contract to marry can only be avoided by the act of the infant, and not of the guardian: *Parks v. Maybee*, 2 C.P. 257.

In *Collins v. Martin*, 41 U.C.R. 602, it was held that if a guardian demised lands of his ward by deed in his own name, his personal representatives only, could sue for the rent; and if not by deed, his successor as guardian might sue for it in the name of the infant, but not in his own name as guardian.

Personal property here belonging to an infant domiciled abroad will be paid to him, when he is by the law of his domicile entitled to receive it, or to his guardian, if the latter be so entitled: *Re Brown's Trusts*, 12 L.T.N.S. 488; *Re Creighton's Trusts*, 24 L.T. 267; *Re Ferguson's Trusts*, 22 W.R. 762; *Re Hellmann's Will*, L.R. 2 Eq. 363. In all of these cases proof was given of the law of the domicile. In *Hanrahan v. Hanrahan*, 19 O.R. 396, the cases are reviewed, and the view is there expressed that the decision in *Flanders v. D'Evelyn*, 4 O.R., might have been different if it had been decided after *Huggins v. Law, ante*. The short ground of decision in *Flanders v. D'Evelyn* was that a foreign guardian has no *locus standi* in our courts. In *Hanrahan v. Hanrahan* it was decided that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there, where his father had also been domiciled at the time of his death, were entitled to have the infants' share of the father's estate in Ontario paid over to them by the administrators in Ontario, there being no debts.

Where money is in court it will not be paid out to the guardian of infants entitled to it, upon the application of the guardian as of right; but in a proper case an allowance for the maintenance and education of the infants may be made to him out of the fund. The High Court has power to direct guardians



and other trustees in their management of the property, or to take it out of their hands and assume the care and management of it. The absolute security of the corpus is of prime importance; and if the money is in the hands of the guardian, the High Court has power to order him to pay it in. In consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court, in the administration of an estate, takes charge of the share going to infants and invests the same for their benefit, instead of the amount being left in the hands of trustees: *Re Harrison*, 18 P.R. 303; *Mitchell v. Richey*, 13 Gr. 445; *Kingsmill v. Miller*, 15 Gr. 171; *Re J. G. Smith's Trusts*, 18 O.R. 327.

It is the invariable practice of the High Court, in suits for the administration of trust property, to order the money, upon the application of the parties beneficially interested, to be paid into Court: *Robertson v. Scott*, 14 L.T.N.S. 187; *Marryat v. Marryat*, 23 L.J. Ch. 876; *Bromley v. Kelley*, 39 L.J. Ch. 274.

In the case of a female infant born in France, but a British subject by reason of her paternal grandfather being a natural-born British subject, the Chancery Division in England has power to appoint a guardian of such infant, though she has no property in England, but has property in France where she resides with her mother, a French woman: *In re Willoughby*, 30 Ch. D. 324.

Since 2 Edw. VII. ch. 12, sec. 11, the guardian may be allowed compensation for his services in and about the estate of his ward in the same way as in the case of an executor.

Before that statute was passed the Surrogate Court had no jurisdiction to pass the accounts of a guardian appointed by that Court: *Murdy v. Burr*, 2 O.L.R. 310.

But now that Act and the new sub-section 28(a), added by 63 Vict. ch. 17, sec. 18, as amended by 3 Edw. VII. ch. 7, sec. 26, to the Trustees Act, R.S.O. 1897, ch. 129, gives the Surrogate Court power to pass the accounts of guardians or other trustees.

In all matters and applications touching or relating to the

appointment, control or removal of guardians, and the security to be given, the custody, control of or right of access to an infant, and otherwise, the several Surrogate Courts shall have the like powers, jurisdiction and authority for the examination of witnesses, the production of deeds and writings, and generally for the enforcing of all orders and judgments made or given, as are given to them by the Surrogate Courts Act in matters testamentary; and all orders and judgments may be appealed from to a Divisional Court of the High Court of Justice in the manner provided in the said Act in respect of appeals in matters testamentary: Section 20.

By section 21 "the practice and procedure shall, except where otherwise provided for by rules made under the Surrogate Courts Act, conform, as nearly as the circumstances of the case will admit, to the practice and procedure prescribed by the said Act, and all the powers given by the several sections of that Act to the Judges mentioned in sections 86 and 88 of the said Act, may from time to time be exercised by them, for the purpose of simplifying and expediting the proceedings, and for fixing and regulating the fees to be taken by officers and by solicitors and counsel respectively for business and proceedings done and taken under this Act in the several Surrogate Courts." By sub-section 2 of that section, which was added by 3 Edw. VII. ch. 7, sec. 32, "The fees to be charged to applicants for all proceedings and services where the whole estate and effects do not exceed in value the sum of \$400, shall not in any one case exceed the sum of \$2."

The practice of the Ecclesiastical Courts in England as it existed in the Court of Probate in England on the 5th day of December, 1859, has been adopted in Ontario. In the Ecclesiastical Courts "infant" and "minor" were often distinguished, an infant being under the age of seven years, and a minor over seven, but under twenty-one. The Surrogate Courts Act and Surrogate Court Rule 17 do not expressly authorize the Court to summarily nominate or assign guardians to take administration for the

use and benefit of infants and minors who have no testamentary guardian, and for whom no guardian has been appointed either by the Act Respecting Infants or by the Surrogate Court upon a formal application in pursuance of the powers conferred by that Act.

But it may be assumed that the former practice of the Prerogative Courts and of the English Court of Probate, under which these Courts summarily nominated and appointed guardians to take administration for the use and benefit of the infants entitled thereto, and during the minority of such infants, where there is no testamentary or other guardian, is a part of the practice of the Surrogate Courts, to which it has been transmitted through the former Court of Probate of Upper Canada: *Ewing*, 1 Hagg. 381; *Brotherton v. Hellier*, 2 Lee 131. The consent of the infant must in all cases be filed if he is of the age of fourteen years or over. Rule 17.

If there is a testamentary or other lawful guardian, he will be entitled to the administration during the minority of the infants: *Eyre v. Shaftesbury*, 2 P. Wms., at p. 125.

Section 22 provides for compelling the attendance of a witness to testify on oath respecting any matter in any proceeding under this Act by an order made for the purpose. A copy of the order is served, and the expenses of the witness paid, in the same manner as in an action. Proof may also be made by affidavit. But see section 28 of the Surrogate Courts Act as to oral examination of witnesses in court; sections 29 and 30 as to commissions to examine witnesses, and sections 22 and 23 as to trial by jury.

Rules have been made pursuant to the powers given by the statute for regulating procedure in guardianship matters, and forms have been prescribed by the rules. The rules also fix the fees of the Judges and Registrars, and of solicitors and counsel in matters of guardianship and infancy.

The practice is made to conform to that in vogue under the rules in matters relating to probate and administration. Caveats

may be lodged, warned, and appearances entered, as in matters of probate and administration.

The security given by the guardian is a bond, in the name of the infant, in such penal sum and with such securities as the Judge directs and approves. The condition of the bond is set out in section 13 of the Act Respecting Infants. The rules prescribe the form of the bond.

Upon an application for letters of guardianship, the following papers should be filed on behalf of the applicant.

(1) The petition.

(2) The affidavit verifying the facts stated in the petition.

(3) A copy of the notice published in the *Ontario Gazette* and in a newspaper published in the county, if the application for letters of guardianship comes within section 12 of the Act Respecting Infants, with an affidavit shewing the publication of the same.

(4) The oath of the guardian.

(5) The bond of the guardian in such sum as the Judge directs, with an affidavit shewing the due execution thereof, and the affidavit of justification of the sureties.

(6) The consent of the infants, if fourteen years of age, verified by affidavit.

(7) The affidavit of value of the property of the infants.

(8) The inventory and valuation of their real property, shewing also its annual value.

(9) The inventory and valuation of their personal property.

The Registrar of the Court must also add to these :

(a) The certificate of the Surrogate Clerk.

(b) The list of papers submitted to the Judge, and

(c) The list of fees, and the Judge's order directing the grant.



## CHAPTER XXXVII.

### PASSING ACCOUNTS OF EXECUTORS, ADMINISTRATORS AND GUARDIANS.

An executor or administrator, on taking out letters probate or letters of administration, swears that he will render a just and true account of his executorship, or of his administration, as the case may be, when thereunto lawfully required.

The bond of the administrator gives security that he will “make, or cause to be made, a true and perfect inventory of all the property of the said deceased, which has or shall come into the hands, possession, or knowledge, of the said (administrator), or into the hands and possession of any other person or persons for him, and the same so made, do exhibit or cause to be exhibited into the Registry of the Surrogate Court of the County of , whenever required by law so to do.”

The statute, 21 Hen. VIII. ch. 5, required executors and administrators to make inventories of all the goods, chattels, wares, merchandises, as well moveable as not moveable, that were of the deceased. See R.S.O. 1897, ch. 337, sec. 9.

The statute, 22 & 23 Car. II. ch. 10, sec. 1, required an administrator to enter into a bond, one of the conditions of which was that he should bring into the Registry of the Court, at or before a day specified, a true and perfect inventory of the goods, chattels and credits of the deceased, come into his possession.

The Court of Probate Act, 1857, sec. 23, preserved to the Court of Probate all the powers which were formerly exercised by the Ecclesiastical Courts in all matters and causes testamentary within their jurisdiction; but the bond given under that Act is conditional to make a just and true account of the administration when required by law so to do. But the Court of Probate could not compel administrators who had taken out administration in an Ecclesiastical Court, to file inventories and accounts in

the Court of Probate, as by the statute these inventories and accounts were returnable only into the Court of Chancery, but the Court of Probate had power to cause the administration bond to be assigned, on proof that no such inventory and account had been filed, either in the Ecclesiastical Courts or in the Court of Chancery.

In Ontario, section 72 of the Surrogate Courts Act, 1897, as amended by 2 Edw. VII. ch. 12, sec. 1, provides that "where an executor or administrator or guardian has filed in the proper Surrogate Court an account of his dealings with the estate of which he is executor or administrator or guardian, and the Judge has approved thereof, in whole or in part, if the executor or administrator or guardian is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn, shall be binding upon any person who was notified of the proceedings taken before the Surrogate Judge, or who was present or represented thereat."

"2. Guardians appointed by the Surrogate Court may pass the accounts of their dealings with the estate to which they are appointed guardians, before the Surrogate Judge of the county from the Surrogate Court of which their letters of guardianship issued. This section shall be retrospective, and shall apply to all Surrogate Court guardians heretofore appointed and who have passed their respective accounts before the Surrogate Court Judge, save and except guardians' accounts in litigation at the date of this Act." (17th March, 1902.)

In consequence of the decision in *Re Russell* (1894), 8 O.L.R. 481, the following clauses were added by 5 Edw. VII. ch. 14, to section 72 as clauses 3 and 4 thereof:—

"3. The Surrogate Court Judge, on passing the accounts of an executor, administrator or trustee, shall have jurisdiction to enter into and make full enquiry and accounting of and concerning the whole property of the deceased which he was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as can be had and done in the

Master's Office in the High Court under an administration order, and for such purpose to take evidence and decide all disputed matters arising in such accounting subject to an appeal under section 36 of this Act.

(4) The persons interested in the taking of such accounts or the making of such enquiries shall, if resident within Ontario, be entitled to not less than seven days' notice thereof, and if resident out of Ontario shall be entitled to such notice as the said Surrogate Court shall direct."

In *Re Russell*, 8 O.L.R. 481, decided in 1904, the executrix was charged with the sum of \$500, which, she alleged, had been given to her by the testator six months before his death, and which was deposited by her in a bank in her own name. The executrix claimed the money as her own, and did not include it in her inventory. The Surrogate Judge decided that it was part of the estate. Upon appeal it was decided that the Surrogate Judge had no jurisdiction to determine the ownership of the money, all that he could do was to report the circumstances, and approve of the rest of the accounts.

In consequence, sub-sections 3 and 4 were added to the section. Their effect was considered in the case of *In re MacIntyre*, 11 O.L.R. 136. Even after the amendment, the Judge of the Surrogate Court has no jurisdiction to call upon creditors of the estate to prove their claims, or to adjudicate upon the claims of creditors, so as to approve or bar them. It was not intended that power should be given in a proceeding of that kind to call in the creditors of the estate and adjudicate upon their claims, and practically to administer the estate. The object of the legislation in adding sub-sections 3 and 4 was undoubtedly to make it clear that the Judge had power to enter into any question which it was necessary for him to deal with in order to determine how much the personal representative had received, or ought to have received, and to be charged with, and to credit him with what he had properly paid, so as to ascertain the balance with which

he was chargeable; and to remove the narrow construction put on the section in *Re Russell*, *ante*.

The extension of the section to guardians' accounts was in consequence of the decision in *Murdy v. Burr*, 2 O.L.R. 310, that the Judge of a Surrogate Court had no authority to pass the accounts of a guardian appointed by such Court, and that there was no power to pass them under section 18 of 63 Vict. ch. 17, as the guardian is not a trustee within the meaning of that section, as originally passed.

Surrogate Court Rule 19, made under what is now section 88 of the Surrogate Courts Act, and coming into force on the 1st day of April, 1892, while in force in its entirety, governed the passing of accounts of executors and administrators. It is as follows:—

“Executors and administrators shall within a period of eighteen months after grant made, and sooner if the Judge shall so direct, exhibit under oath a true and perfect inventory of the property of the testator or intestate, as the case may be, and render a just and full account of their executorship or administration. The Judge shall, upon application made to him for that purpose, have power to extend the said period of eighteen months.

“If the executor, or administrator with the will annexed, is the sole legatee or devisee of the property devolving, the Judge may direct that he shall be relieved from the operation of this rule, provided there are no creditors of the estate.”

“(a) The general rules which govern in the Master's office of the Supreme Court of Judicature under a judgment, or order of reference, and the rules of practice and procedure thereof for the time being, so far as the same can be made to apply, shall be adopted in the case of the auditing of an executor's and administrator's account by the Judge, substituting the word ‘Judge’ for the word ‘Master,’ and also for the word ‘Examiner,’ wherever it occurs in any such rule (See Con. Rules of Practice, 57 *et seq.* to Rule No. 59 inclusive).”



The Ontario Legislature, unwilling that the personal representatives of every estate should be put to the expense of passing accounts upon compulsion, whether it was deemed necessary by those interested or not, first suspended, and then modified, the Rule.

Section 73 of the Surrogate Courts Act, as amended by 2 Edw. VII. ch. 12, sec. 11, sub-sec. 3, is as follows:—

“73. (1) Notwithstanding anything to the contrary contained in any bond or other security heretofore or hereafter made and entered into with respect to the administration of an estate, or in any letters probate or letters of administration, no executor or administrator shall be compellable to render an account of his executorship or administration to the Surrogate Court within eighteen months, except in cases in which a party interested in an estate takes proceedings to obtain an inventory and accounting, or in which infants are interested in such inventory and accounting.

(2) The oaths to be taken by executors, administrators and guardians, and the bonds or other security to be given by administrators and guardians and letters probate, letters of administration and letters of guardianship hereafter issued shall require the executor, administrator and guardian to render a just and full account of his executorship, administration or guardianship only when thereunto lawfully required. 2 Edw. VII. c. 10, s. 16.”

It is to be carefully noted that there are several cases in which executors and administrators must still pass their accounts within eighteen months. The first is when a party interested in the estate takes proceedings to obtain an inventory and accounting. The second is where infants are interested in such inventory and accounting. In the latter instance the law still requires that the executors or administrators shall pass their accounts within eighteen months of the death of the testator or intestate, without citation or other proceeding, but solely of their own motion.

It is not only the duty of the executor or administrator [or

guardian now] to file an inventory and render an account when duly called upon to do so, but it has always been his privilege to do so voluntarily in any case in which he is liable to be called upon, and in order to exonerate himself from liability it is always a most prudent thing for him to do. See *Kenny v. Jackson* (1827), 1 Hagg. Ecc. 105. Not only is the executor or administrator himself liable to be called upon, but so also is his personal representative, although not at the same time the representative of the first testator or intestate, upon a reasonable presumption being raised that any part of the effects of the first testator have travelled into his hands: *Ritchie v. Rees* (1822), 1 Addams, at p. 153. And this is so even where there is a surviving executor of the original testator: *Gale v. Luttrell* (1824), 2 Addams 234. It follows that being liable to be called upon, he may voluntarily undertake to render the inventory and account: *Cunnington v. Cunningham*, 2 O.L.R. 511.

The executor or administrator is compellable to bring in an inventory and account of his dealings with the estate, at the prayer of any person having an interest, or even the appearance of an interest: *Phillips v. Bignell*, 1 Phillim. 241.

The personal representative of the residuary legatee of the residuary legatee of the original testator has such an interest as will entitle him to call upon the personal representative of the original testator to pass his accounts: *Winchlow v. Smith*, 1 Cas. temp. Lee. 417.

A probable or contingent interest is sufficient to give the right to an accounting: *Reeves v. Freeling*, 2 Phillim. 57; *Burgess v. Mariott*, 3 Curt. 424.

So, too, may a creditor, though his claim be contested: *Smith v. Price*, 1 Cas. temp. Lee. 569; *Gale v. Luttrell*, 2 Add. 234; or the assignee in bankruptcy of one who claimed to be a creditor of the deceased, though apparently barred by the Statute of Limitations: *Phillipson v. Harvey*, 2 Cas. temp. Lee. 344.

An executor who is a residuary legatee may call upon his co-executor for an inventory: *Paul v. Nettleford*, 2 Add. 237; and even without being a legatee: *Huggins v. Alexander*, 2 Add. 238.

A cessate or secondary administrator may call upon the original administrator to exhibit an inventory and account: *Taylor v. Newton*, 1 Cas. temp. Lee. 15.

But where the amount of the legacy has been offered to the legatee, as in *Boon*, Sir T. Raymond 470; or where the personal representative admits sufficient assets to pay the legatee his legacy of a definite amount and the costs of suit, as in *Fleet v. Holmes*, 2 Cas. temp. Lee. 101; or where the executrix claims all the assets under a bill of sale alleged to have been made by the testator, in consideration of a debt due the executrix, as in *Leighton v. Leighton* (1757), 2 Lee. 101, an inventory is refused. It will also be refused when the person interested is proceeding in the High Court to have the estate administered, as he should not pursue his remedy in both courts: *Myddleton v. Rushout*, 1 Phillim. 247.

An attorney who takes a grant for the use and benefit of his principal may be compelled to account by the latter: *Bailey v. Bristowe*, 2 Robert. 145; so, too, an administrator *durante minore ætate*, even after his administration has expired, as in *Taylor v. Newton*, 1 Cas. temp. Lee. 15; and an administrator *pendente lite*, as in *Brotherton v. Hellier*, 2 Cas. temp. Lee. 131, have been compelled to account.

An administrator *de bonis non* may call upon the representatives of the deceased administrator to account, and he is entitled to charge against the estate of such predecessor interest in the same circumstances and to the same extent as the next of kin might have done: *McLennan v. Heward*, 9 Gr. 178.

Time was not of itself, in the Ecclesiastical Courts, a bar to the right to an inventory and account; but where the lapse of time was great, the request has frequently been refused: *Marriott v. Burgess*, 3 Curt. 426; especially when the circumstances raise a presumption that the estate has been fully administered, or that the person applying has received his share and has now no interest: *Ritchie v. Rees*, 1 Addams. 144; *Pitt v. Woodham*, 1 Hagg. 247; *Bowles v. Harvey*, 4 Hagg. 241.

In *Scurrah v. Scurrah*, 2 Curt. 919, an application to compel an administratrix to account after the lapse of eighteen years was refused; and in *Higgins v. Higgins*, 4 Hagg. 242, a declaration without vouchers or accounts was accepted, after the lapse of seventeen years.

The jurisdiction of the Ecclesiastical Courts as to accounting was of a very restricted character. They had authority only to insist that everything of which the deceased died possessed should be included in the inventory and accounted for by the executor: *Pitt v. Woodham* (1828), 1 Hagg. 247.

The older cases indicate that the inventory may be falsified at the instance of a legatee, but not on the application of a creditor: *Hinton v. Parker* (1723), 8 Mod. 168; *Archbishop of Canterbury v. Willis* (1708), 1 Salk. 251, 315; *Henderson v. Smith* (1816), 5 M. & S. 406.

There is some conflict as to whether the duties of the Ordinary were merely ministerial, or whether he had power to entertain objections to the inventory. The latter view was maintained in *Telford v. Morison* (1824), 2 Add. 319. The former view was taken in *Griffiths v. Anthony* (1836), 5 A. & E. 623.

Questions as to whether property formed part of the estate of the deceased to be administered, or had been disposed of by gift *inter vivos* in his lifetime, cannot be disposed of on passing accounts: *Smith v. Oram* (1756), 2 Lee 256; *Re Russell*, 8 O.L.R. 481; or where the executrix contends that the goods were conveyed to her by the testator by bill of sale in consideration of a debt he owed her, the goods need not be included in the inventory and there is no jurisdiction, upon the passing of the accounts, to inquire into the validity of the transaction. Such an inquiry must be conducted before the proper tribunal. No greater measure of jurisdiction in scope, though there may be in detail, is vested in the Surrogate Courts than was possessed by the Ecclesiastical Courts: *Re Russell*, 8 O.L.R. 481.

But since that decision, 5 Edw. VII. ch. 14 was passed to make it clear that, as against an executor or administrator, the



Judge of the Surrogate Court may determine any question, such as was raised in that case, which may require to be investigated for the purpose of finding what assets of the deceased have come into his hands. The amendment does not, however, give jurisdiction to investigate the claims of ordinary creditors: *In re MacIntyre*, 11 O.L.R. 136.

The exceptions to the finality of accounts under the sections of the Surrogate Courts Act applicable thereto, are fraud and mistake.

In the same connection one may, perhaps, usefully refer to the limitations imposed by section 32 of the Trustee Act, R.S.O. 1897. This section, which was passed in Ontario in 1891, is substantially the Imperial Act, 51-52 Vict. ch. 59, sec. 8, and applies to actions and proceedings commenced after the first day of January, 1892. There are three cases in which its benefits are not applicable. (1) When the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was a party or privy. (2) When the action is to recover trust property, or the proceeds thereof, still retained by the trustee, or (3) When the claim is to recover trust property which the trustee had received and converted to his own use.

In any case not within these exceptions, a trustee, or any person claiming through him, has the benefit of all statutes of limitations as fully as if the transaction impeached had not arisen out of a trust.

If the action is to recover money or other property, and no statute of limitations applies, the lapse of time is to have the same effect as if the action were an ordinary action of debt for money had and received: *Gardner v. Perry*, 6 O.L.R. 269; *Re Bowden*, *Andrew v. Cooper*, 45 Ch. D. 464.

The statute runs against a married woman entitled in possession for her separate use, whether with or without restraint on anticipation.

Time, under this section, does not begin to run against a bene-

ficiary until the interest of such beneficiary is an interest in possession.

No beneficiary can derive any greater benefit by an action instituted by any other beneficiary, than he would take if he had brought the action himself, and the section had been pleaded, and it does not take away any defence arising from any other statute of limitations.

The Imperial Act, 59 & 60 Vict. ch. 35, sec. 3; 62 Vict. 2nd sess., ch. 15 (O.), extended relief to a trustee guilty of a breach of trust, but who has acted honestly and reasonably and who might fairly be excused: *Dover v. Devine*, 3 O.L.R. 664.

The powers of the Surrogate Courts as to passing accounts are not restricted to the accounts of executors, administrators and guardians appointed by the Court. By 63 Vict. ch. 17, sec. 18 (Ont.), as amended by 3 Edw. VII. ch. 7, sec. 26, a trustee appointed by any deed, will or other instrument in writing, or by an order of any Court, may bring in and pass his accounts in the Surrogate Court of the county in which he, or one of the trustees resides, or in which the trust estate is situated. The proceedings and practice are the same as upon the passing of the accounts of executors or administrators, and with the like effect. If the trustees are appointed by will, the accounts must be passed in the Surrogate Court which issued probate of the will. This section did not, in its original form, apply to guardians appointed by the Surrogate Court, as they were not appointed by deed, will or other instrument: *Murdy v. Burr*, 2 O.L.R. 310.

The practice, when the accounts are passed upon the application of the personal representative of the deceased, is for them to present a petition to the Surrogate Court, asking to have the accounts passed. The petition is accompanied by an affidavit of one or more of the executors, verifying accounts which show separately in detail (1) all money and property which have come into their hands; (2) all payments and transfers of property made by them, and (3) all assets still on hand, whether money, securities for money, or other property. This affidavit is filed

with the Registrar, and all the receipts and other vouchers are deposited with him for inspection by those interested. The Surrogate Judge then signs an appointment for the passing of the accounts, in which a direction is given for the service of the appointment upon those who are interested in the accounts, or who would be entitled to have them passed. It is desirable to have every person served who has any interest, as the accounts when passed are binding only upon those who were notified of the proceedings taken before the Surrogate Judge, or who were present or represented thereat: Surrogate Courts Act, sec. 72.

In some instances, the accounts are directed by the Judge to be served, in addition to the appointment, upon some of the beneficiaries, as, for instance, the residuary legatee.

In cases where security has been given for the payment of succession duty as provided by the rules made under the Succession Duty Act, notice of any appointment for the passing of the accounts must be served upon the Solicitor to the Treasury by the executor or administrator or his solicitor, together with a copy of the accounts.

Service of the appointment is made personally, as a general rule, upon beneficiaries resident in Ontario, and by registered letter or otherwise, as the Judge may direct, upon those who reside out of the province.

The Official Guardian is served on behalf of infants.

The Judge directs how long time service must be made out of Ontario before the date fixed for passing the accounts.

Compulsory proceedings for the bringing in and passing of accounts are begun by citation. That was the practice in the Prerogative Court, and it was continued in the Court of Probate in England: *Bailey v. Bristow*, 2 Robert. 145; *Marshman v. Brooks*, 32 L.J.P. & M. 94.

The person who claims to have the accounts passed, files an affidavit setting out the facts which entitle him to have the accounts passed. The Surrogate Judge then issues a citation to the

executors or administrators to bring in and pass their accounts. The citation is by Judge's order: Rule 21.

All proceedings by citation are contentious: Contentious Rule

1. Section 28 of the Surrogate Courts Act provides that in all contentious matters witnesses and parties may be examined orally by or before the Judge of the Surrogate Court, in open Court, and there is full power given to cross-examine the deponents whose affidavits have been filed, on the application of the opposite party, and to re-examine them.

The Consolidated Rules referred to in Surrogate Court Rule 19, were formerly 57, 58 and 59. The present corresponding rules are Nos. 667, 668 and 669. They are as follows:—

667. Under a judgment or order of reference, the Master shall have power:

(a) To take the accounts with rests or otherwise;

(b) To take account of rents and profits received or which, but for wilful neglect or default, might have been received;

(c) To set occupation rent;

(d) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so;

(e) To make all just allowances;

(f) To report special circumstances;

(g) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred.

To take an account with rests means that the party accounting is charged with compound interest on the amount he owes, or that the surplus income remaining after satisfying the interest due to him is applied in reduction of the principal owing to him. The rests may take place yearly, half-yearly or quarterly.

In taking accounts against an executor or trustee, he is charged with what he ought to have made, with what he actually



did make, or with what he must be presumed to have made: *Smith v. Rae*, 11 Gr. 312.

In *Inglis v. Beatty*, 2 O.R., at 490, Moss, C.J., after a long review of the authorities, thus sums them up: "Now, through this long line of cases, I think the great principles which the Court has, on the whole endeavoured to enforce are, on the one hand, that of restoring to the *cestui que trust*, his own, and of fairly compensating him for loss directly attributable to the neglect or breach of duty by the trustee; and, on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position."

The principle and the object in every case is to make good the loss caused by the acts of omission or commission of the trustee, or to wrest from him any benefit he has, or is taken to have, derived from the use of the trust moneys": *Wightman v. Helliwell*, 13 Gr., p. 344.

Compound interest may in some instances be a convenient mode of making this compensation, as in *Small v. Eccles*, 12 Gr. 41, but in other cases it may be oppressive, and sound more as punishment than as compensation: *Fielder v. O'Hara*, 14 Gr. 223.

When there has been mere neglect of duty, and the personal representative gets no benefit, simple interest is ordinarily charged: *Rocke v. Harle*, 11 Ves. 58.

Where he is guilty of a positive breach of trust, as, for instance, the neglect to comply with a specific direction as to investment, or has employed the trust money as his own, he is charged with interest at a higher rate, and usually with rests; or in the alternative, he may be charged with the profits he has made. Where an infant is interested, an inquiry may be directed to see whether it is to his advantage to take interest or to take profits. See Holmsted & Langton's Judicature Act, for copious notes on this rule.

668. "Witnesses may, by direction of the Master, be examined before a Special Examiner."

By section 28 of the Surrogate Courts Act, power is given to examine witnesses orally in all contentious matters, and to cross-examine and re-examine them in open court.

By sections 29 and 30 of the same Act the Court is empowered to issue a commission to examine a witness who is out of Ontario, or where by reason of his illness or otherwise, the Court does not think fit to enforce his attendance in open Court. The examination may be either upon interrogatories or otherwise.

669. "The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or, in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he deems expedient."

A subpœna may issue as of course to secure the attendance of witnesses before a Master: *Hannum v. McRae*, 17 P. R. 567.

Section 25 of the Surrogate Courts Act empowers the Court to require the attendance of witnesses for examination, and to examine them orally, and upon interrogatories, and to receive their affidavits or affirmations; and to issue a *subpœna* or *subpœna duces tecum* to require the attendance of the witnesses and the production of any deeds, evidences or writings before such Court or otherwise.

Upon the passing of the accounts, the Judge of the Surrogate Court fixes the amount of the compensation to be allowed to the executors or administrators for their services.

A formal order is then drawn up shewing the amount of the receipts as found by the Court; the expenditures properly made in the due course of administration; and the amount of assets still on hand after deducting the compensation of the personal representatives, and the costs of passing the accounts. The solicitor who acts for the parties to whom costs are allowed, attends the Registrar of the Surrogate Court with his bill of costs in

connection with the passing of the accounts, and has it taxed. He then attends the Judge with the Registrar's certificate of taxation, and the amount of the taxed costs is inserted in the order and deducted from the assets shewn by the order to be on hand.

An executor or administrator cited to bring in his accounts may be proceeded against for contempt if he fails to attend and file his accounts.

Section 32 of the Surrogate Courts Act gives every Surrogate Court the same powers, jurisdiction and authority for punishing contempt of Court, and generally for enforcing all orders, as are vested in the County Courts.

The Ecclesiastical Courts discouraged all hanging back with respect to the production of an inventory when called for; and generally condemned the parties who were guilty of it in costs: Williams on Executors, 10th ed., p. 746.

In Ontario the compensation of trustees, executors, administrators and guardians is provided for by sections 40 to 44 of the Trustee Act, R.S.O. 1897, ch. 129, as amended by 63 Vict. ch. 17, sec. 18, and 3 Edw. VII. ch. 7, sec. 27.

"Any trustee under a deed, settlement or will, any executor or administrator, any guardian appointed by any Court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the High Court or Judge, or Surrogate Court Judge, or by any Master or Referee thereof, to whom the matter may be referred." Section 40 as amended by 63 Vict. ch. 17, sec. 18, sub-sec. 2.

"A Judge of the High Court may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any action." Section 41.

"Compensation may be allowed in the case of any trust heretofore created, as well as in any to be hereafter created." Section 42.

“The Judge of any Surrogate Court may allow to the executor or trustee or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, administrator or trustee in passing his accounts.” Section 43.

By 3 Edw. VII. ch. 7, sec. 27, section 43 of the Trustee Act was amended by adding the following sub-section:

“(2) Where a barrister or solicitor is a trustee or executor or administrator and has rendered necessary professional services to the estate, regard may be had in making the said allowance to such circumstances, and such allowance shall be increased by such amount as the Court, Judge, Master or Referee may consider to be fair and reasonable in case of such necessary professional services; provided that nothing in this sub-section shall affect pending litigation.”

“Nothing in the next preceding four sections shall apply to any case in which the allowance is fixed by the instrument creating the trust.” Section 44.

We have already seen that by 60 Vict. ch. 17, sec. 18, as amended by 3 Edw. VII. ch. 7, sec. 26, any trustee, whether appointed by any deed, will or other instrument in writing or by an order of any Court may pass his accounts in the Surrogate Court.

The amount of compensation to be allowed to executors and administrators depends wholly upon circumstances. They cannot have an allowance for work done by others without charge. Five per cent. commission on moneys passing through the hands of executors and trustees may or may not be an adequate compen-



sation, or may be too much, according to circumstances. There may be very little money got in, and a great deal of labor, anxiety, and time spent in managing an estate, when five per cent. would be a very insufficient allowance: *Chisholm v. Bernard*, 10 Gr. 479.

Until the statute, 23 Vict. ch. 93, sec. 47, no executor or administrator as such could claim any allowance for his services. This rule in regard to trustees was established early in Courts of Equity, and was inflexible. One of the principal reasons for the rule was that he might not create work with which to charge and load the estate. The trustee should not make his duty subservient to his interest. Consequently, since the statute, compensation will not be allowed where he has not done the work, or has done it in such a way as to prejudice the estate or benefit himself. The Act provides "for a fair and reasonable allowance to the executor for his *care, pains, and trouble*, and his time expended in and about the executorship, and in *administering, disposing of*, and generally in *arranging and settling* the same; and therefor the Court may make an *order or orders from time to time*." This provision seems to mean that for such portion of the duties as the executor or administrator has bestowed his care, pains, trouble, and time upon, in the proper administration of the estate, he shall receive reasonable compensation. When he has neglected any portion of his duties, or has applied his care and pains in mal-administration, it would scarce be asked that in respect of it, however much trouble may be brought upon him thereby, he should receive any wages or reward: *McLennan v. Heward*, 10 Gr., at p. 283.

That statute abrogated the old rule, for the benefit of executors and administrators only, not in the case of other trustees: *Wilson v. Proudfoot*, 15 Gr. 103.

In that case the principles on which an administrator should be charged with interest on funds in his hands, were considered. The administrator who had acted as agent of the intestate in his lifetime, had, with the assent of the deceased, used moneys be-

longing to him, without any attempt at concealment; the Court refused to take the account with rests, and allowed the administrator five per cent. on moneys received and paid out again, and two and one-half per cent. upon money gotten in and not paid, or to be paid over under the compulsion of an administration action: *McLellan v. Heward*, 9 Gr. 179, 279.

Four per cent. has been allowed to executors as a commission upon transfers of stocks: *Torrance v. Chewett*, 12 Gr. 407.

In *Thompson v. Freeman*, 15 Gr. 384, the Master allowed one executor five per cent. on the sum of \$286,798.19 received and disbursed by him, and two and one-half per cent. on about \$12,000 more which had been received but not disbursed, a total commission of more than \$14,600. Upon appeal from the Master's report it was said that regard should be had to the amounts passing through the hands of executors and trustees. The sliding scale adopted in fixing the poundage payable to sheriffs on levying money upon executions, allowing the maximum percentage upon small sums, and reducing the scale as the amount increases, was considered as furnishing an analogy applicable to the compensation to executors and trustees. For making investments upon mortgages, five per cent. up to six hundred dollars, and three per cent. upon the excess over six hundred dollars, was said to be a reasonable compensation. But it was indicated that if there was any special trouble or difficulty in making the investments, that should entitle him to higher compensation: *Thompson v. Freeman*, 15 Gr. 384.

A different sum was allowed to each of the executors in that case, according to the extent of the services each one rendered.

An allowance of five per cent. on a sum of more than \$27,000 both received and disbursed by a paid agent in Indiana was made by the Master. The Court decided upon the appeal that a percentage was not the proper mode of compensation. Some compensation should be made, for it was the duty of the executors to see that the estate did not suffer detriment in the conduct of the business, and this would involve some care, labour and anx-

iety, and for this they should be compensated, and that not illiberally. One of the executors, who occasionally visited Indiana for the general supervision of the business there, was entitled to be specially compensated. The report was referred back to the Master. *Ib.*

For the unequal division of the remuneration amongst the executors, see also: *Re Fleming*, 11 P.R. 272; *Denison v. Denison*, 15 Gr. 306.

In the case of *In re Central Bank, Lye's Claim*, 22 O.R. 247, the Master in Ordinary allowed one and one-quarter per cent. on all moneys got in by the liquidators of the defunct Central Bank, without pressure, and three per cent upon all sums got in after pressure. His reasons are given in 26 C.L.J. 24. Upon his refusal of a subsequent application for an allowance on claims adjusted by way of set-off, an appeal was taken to the Court, and one and one-quarter per cent. was allowed on \$231,000, the amount adjusted or set-off as compensation for services in that connection. The total remuneration of the liquidators was \$48,032, which was about two and one-quarter per cent. of the whole amount collected.

In Scotland, an allowance of two and a half per cent. on "gatherings" of £312,000 was not considered too much: *Assets Co. v. Guild* (1885), 23 Scotch L.R. 170.

In *Re Bassford* (1884), 13 Daly 22 (New York), it appears that the rate allowed to assignees for the benefit of creditors is five per cent upon the whole sum which comes into their hands, including the amount of claims adjusted by set-off, the rate being fixed by statute. In Ohio the rate is six per cent. on the first \$1,000, four per cent up to \$5,000, and all above that two per cent. In Scotland the usual rate in bankruptcy is five per cent, but that is regarded as excessive in cases of large estates: *In re Central Bank*, 22 O.R. 255.

In *Re Batt*, 9 P.R. 447, an allowance of two and one-half per cent. upon the receipts and two and one-half per cent. upon the disbursements was said not to be excessive. Some securities were

handed over to, or allowed to remain in the hands of, a residuary legatee. Compensation was calculated with reference to their value, as the transaction involved personal risk, and the calculation of assets and liabilities.

In *Berkley's Trusts*, 8 P.R. 193, the trusts commenced in 1865, and in 1879 application was made to the Court to fix the remuneration of the trustees for taking over and investing about \$72,000, and paying the income for the life of the life beneficiary. the following points were decided: (1) That on trustees assuming a trust estate, a commission is not to be allowed to them for merely taking it over, but that if they properly deal with it and hand it over on the determination of the trust, they are entitled to one commission for the receipt and proper application of the estate; (2) That trustees are not entitled to commission for the investment or re-investment of the funds of the estate, as that would encourage changes of investments; (3) That they are entitled to a commission on the receipt and payment of the income of the estate, and to a reasonable compensation for looking after the estate; (4) That it is not unreasonable to make some allowance for services not covered by the commission awarded.

An allowance of \$100 was made to each of the trustees for four times taking over the estate as they became entitled to it, \$50 a year was allowed each year from 1865 to 1878 for general supervision, seeing that taxes were paid, insurance kept up, etc., and as the estate had greatly increased, \$150 a year after 1878. These payments were to be made out of the corpus of the estate. \$20,000 of income had been collected and paid over. On this the trustees were allowed four per cent., to be paid out of income. These payments left untouched the commission which might thereafter be allowed when the trust ends so far as these trustees are concerned, for the assumption and handing over of the estate. A number of the American cases as to commission on investment and re-investment are reviewed in the judgment. The Court directed that for the future the trustees might charge \$240 against the income and \$150 against the corpus annually.



But in *Thompson v. Freeman*, 15 Gr. 384, commission was allowed on re-investments.

*Re Berkley's Trusts* was followed in the case of *In re Williams*, 4 O.L.R. 501. The Master allowed two and one-half per cent. on all the personal property, other than household furniture, taken over, and five per cent. on the collection of interest owing at the time of the testator's death. At a later date he allowed them five per cent. on the amount of interest collected in the interval of eleven years, which was nearly \$40,000. The corpus of the estate was \$60,000, of which about \$4,000 was real property. Upon appeal, it was held that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make them an annual allowance for their service in looking after the corpus of the fund, receiving repayments upon principal and re-investing it. Reasons are given why this allowance should not depend upon the amount so collected and re-invested, but should be a fixed annual allowance, based upon the value of the property and the consequent degree of care and responsibility. An annual allowance of \$100 was made for nine years for the care of the principal, in addition to five per cent. on the income. Of the sum, three-quarters was paid to one executor, and one-quarter to the other.

The ordinary commission upon the moneys received and paid out by the trustee may not be an adequate allowance to him. He may, for instance, have the care and management of real property. The burden of managing unproductive real property situated in the suburbs of a city is considerable: *Wagstaff v. Low-erre*, 23 Barb. 224; *Stinson v. Stinson*, 8 P.R. 563.

A lump sum may be allowed for services as executor or trustee, as the remuneration for the care and management of real estate, but there should be evidence from which the Court can see what services have been rendered, and what would be fair compensation therefor: *Stinson v. Stinson*, *ante*.

In an estate of about \$115,000, of which \$32,000 was money, and the rest debentures and stocks, a great many of them payable to bearer, one executor, F., had done nothing in the management of the estate, except on one occasion, when he secured some additional benefits for the widow. He also, under the direction of the private solicitor of the other executor, W.M., signed papers from time to time. The usual commission, in the ordinary case, is five per cent. of the whole sum received and properly paid over; and, having regard to the relative amount of work done by the two, W.M. was paid three and one-half per cent., though the work had been done by his private solicitor, and F. one and one-half per cent: *Re Fleming*, 11 P.R. 272.

In *Denison v. Denison*, 15 Gr. 306, a lump sum of \$1,500 was allowed to one executor and the same amount for the other two executors between them.

Though trustees employ and pay an agent for actually making the collection of rent, they are bound to look after the agent, and for their care, trouble and responsibility are entitled to an allowance. Two and one-half per cent. was allowed to the trustees on the collection of \$5,800 of rents extending over several years, though an agent did the actual work: *Re Prittie's Trusts*, 13 P.R. 19.

A legacy given to executors as compensation for their services does not abate upon a shortage of assets, as do general legacies: *Anderson v. Dougall*, 15 Gr. 405.

In *Bald v. Thompson*, 17 Gr. 154, in an administration suit, the Master found that the executor had received, or but for his wilful default might have received, \$17,063.19; \$3,518.75 was personal estate; \$10,283.76 was the proceeds of real estate sold under powers contained in the will; the remainder, \$3,261.28, was rents of the real estate before it was sold. The Master allowed the executor a commission of five per cent. on \$11,227.48, and disallowed commission on the balance, \$5,836.31. Upon appeal, the rule, that an executor should not be allowed commission on sums which he has not realized, and which he is charge-

able with in consequence of his neglect or other misconduct, was affirmed; and the principle was taken to be established that compensation is to be allowed in respect of real estate as well as of personal property.

Compensation was allowed to the administratrix for services rendered by her as guardian of her infant children, in which capacity she acted without letters of guardianship. She was guardian by nature and for nurture, and though this did not give her a strict right, it was some excuse for her for receiving rents. She was allowed compensation on the receipt and application of the rents on the same basis as upon her receipts as administratrix; but the case was regarded as exceptional: *Doan v. Davis*, 23 Gr. 207.

The gift of a share of the residue of the estate is an element to be considered in fixing the executor's commission. The estate realized amounted to \$20,662.85; of this sum the executors had paid out \$3,434.68; leaving \$17,228.17 in their hands. The Master allowed them \$826.51 as compensation for their personal services. Of the residue, the executors were entitled, under the will, to one-third. As affecting the compensation there is a difference between a specific legacy and a bequest of a share of the residue. In the former case the assumption is that it was given in respect of the trouble incurred in regard to the executorship; in the latter case this is not to be inferred, though it is an element in dealing with compensation. The Master's decision as to commission was varied by directing that no commission should be paid on that portion of the residue which the will gave to the executors: *Boys' Home of Hamilton v. Lewis*, 4 O.R. 18.

In *McDonald v. Davidson*, 6 A.R. 320, the trustee was employed to adjust questions of considerable interest and value between three unmarried ladies and their brother. The nature of the services demanded on the part of the trustee firmness, temper, tact and address. The matters in question were complicated, and extended over several years. There were many interviews on the part of the trustee with the three ladies, with their brother

and with a firm of solicitors, and it took considerable time and attention on the part of the trustee from February to autumn. The Master allowed him \$125.00 for his services. Vice-Chancellor Blake, on appeal, increased this sum to \$250.00, and his decision was affirmed by the Court of Appeal.

In *Thompson v. Fairbairn*, ante, the total amount received by the executors was \$29,000, and they paid out in all about \$5,000. One item on both sides of the account was a transfer of mortgage, on which no compensation was allowed, as it was done by arrangement made by the solicitors in an administration action and sanctioned by the Master. The plaintiff's solicitor collected \$2,400, and paid it over to the executors, and paid a mortgage to them for which he was personally liable, of \$10,000. The compensation allowed was:

One per cent. on \$2,400 + \$10,000.....	\$124.00
Two and one-half per cent. on the balance collected, after deducting the mortgage, i.e., \$12,000. ....	300.00
Five per cent. on the disbursements except the transfer. ....	15.00
	<hr/>
	\$439.00

All the dealings of collecting and paying were after the administration order had been made. The absence of responsibility, in consequence, accounted for the small allowance.

In *Archer v. Severn*, 13 O.R. 316, the personal estate not specifically bequeathed was \$41,818.99, of which they expended \$25,100.93; the rents and profits of real estate received amounted to \$4,051.90, of which they expended \$3,816.91. There were over 300 items on one side of the account, and over 400 on the other. There had been a good deal of care, trouble and labour in the management. Five per cent. on the total receipts was held not to be an excessive remuneration, though there was nearly \$17,000 in the executors' hands with which they were chargeable.



Trustees are not entitled to an allowance upon taking over an estate, but an allowance should be made to them for taking over and distributing. In *Re McIntyre*, 7 O.L.R. 548, the trustees took over about \$60,000 of property in cash, mortgages, notes, furniture and farm property, of which they had distributed a little less than half and had set aside the residue for payment of legacies not matured, annuities, etc. They had collected about \$6,500 of interest, and had looked after the estate for a little more than four years. The trusts were numerous and somewhat complicated in their nature, and the estate was not a simple one to deal with. They were allowed two and one-half per cent. upon the principal taken over and distributed; and the like allowance was to be made of two and one-half per cent. on the residue when distributed, and five per cent. on all the interest collected. They were also allowed \$100 a year for the first two years, and \$75.00 per year for the next two years.

The fact that the business was done, and the accounts kept loosely, by an executor who was not a man of education or acquaintance with accounts, and who intended to act carefully and with pains, and did act with a rude sort of care and pains, and with much trouble and expenditure of time, entitles him to compensation notwithstanding these shortcomings, it not appearing that he intended to act otherwise than honestly. Fair and reasonable compensation ought to be measured to some extent by results; where the care and pains are not of a high quality and the results are poor, \$50 a year was regarded as a fair sum, for a period of nine years: *Hoover v. Wilson*, 24 A.R. 424.

The grounds for refusing compensation are various. Indebtedness to the estate on the part of the executor is not alone sufficient to disentitle him to compensation: *McLennan v. Heward*, 9 Gr. 178; *Archer v. Severn*, 13 O.R. 316; nor is retaining money in his hands unemployed: *Gould v. Burritt*, 11 Gr. 523; but in that case compensation was allowed to one executor and refused to another.

Commission will not be allowed on sums which the executor

did not receive, but is charged with on the ground of wilful default, neglect or other misconduct: *Bald v. Thompson*, 17 Gr. 154; nor will commission be allowed on rents collected by an executor who, under the will, is a mere intermeddler as to such rents: *Dagg v. Dagg*, 25 Gr. 542.

Lack of skill in keeping accounts where they are honestly kept will not disentitle the executor to his remuneration: *McMillan v. McMillan*, 21 Gr., at p. 379.

The use of the money of the estate in the executor's own business is improper. So also is the taking of a mortgage to secure funds of the estate in the name of one of the executors; but in the absence of wilful misconduct, that will not suffice to deprive them of commission: *Kennedy v. Pringle*, 27 Gr. 305.

The course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even to be made to pay costs. There may, however, be cases of such exceptional misconduct as to induce the Court to deprive him of a commission. The hands of the Court are not bound in such a case. The fact that, upon taking the accounts, a balance is found against the executor, is not alone sufficient: *Sieveright v. Leys*, 1 O.R. 375.

In *Simpson v. Horne*, 28 Gr. 1, the mismanagement of the estate by the executor was not only careless, but even perverse. His misconduct jeopardized the safety of the estate, and made an administration suit necessary to prevent loss. His dealing with the goods was characterized in one instance as simply unaccountable, and he was not allowed compensation. But the rule, as stated in that case, is not to deprive a personal representative of compensation unless there has been serious misconduct or mismanagement on his part.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted upon that belief for many years, without objection by those who were inter-

ested under the will, he was charged with simple interest only on such moneys, as it did not appear that he had employed them in trade. But he was allowed his commission: *Inglis v. Beatty*, 1 A.R. 453.

Even when executors, by reason of neglect to invest moneys in their hands, are charged with interest thereon, that is not sufficient to deprive them of compensation for their services. When the money is kept in hand without excuse, the Court rate of interest is allowed. When the executors are guilty of misfeasance, a higher rate may be charged. If the act of misfeasance is of such a character as to lead to the conclusion that considerable profits have been made or the money employed in trade or speculation, the beneficiaries will be allowed the option of having interest with rests or an account of the profits. But if the services of the executors are of value to the estate, they are entitled to compensation, and some allowance will be made on moneys received *pendente lite*. The administration suit does not end their duties: *Re Honsberger*, 10 O.R. 521.

If an executor or trustee takes no care or pains whatever, or so little that the trust estate has received no benefit, or if the care and pains have been used and applied, not for the advantage of the trust, but dishonestly and for the trustee's own benefit, then there may be a proper case for disallowance: *Hoover v. Wilson*, 24 A.R., at p. 426.

If administration is in progress in the High Court, the compensation of the executors or administrators will be fixed in that Court: *McLennan v. Heward*, 9 Gr. 279.

And it is improper for the Surrogate Court to fix the commission of an executor or administrator while an administration suit is pending in the High Court: *Cameron v. Bethune*, 15 Gr. 486.

But an administration suit does not deprive the personal representatives of their duties, and compensation may be allowed for services rendered *pendente lite*: *Re Honsberger*, 10 O.R. 521.

If all the estate of the testator has been fully administered by the executors, but, by the terms of the will, a part of it has been retained and invested by them, as trustees and not as executors, for the use of a beneficiary who becomes entitled to payment thereof at a future time, the compensation to which they are entitled in respect of such services should be charged against the trust fund, and not against the estate generally. It is well settled that the expenses and compensation of executors in getting in, clearing, dealing with, and generally administering the assets of an estate are to be borne by the aggregate of the estate. But the share in question when set apart for the trusts ceased to be assets of the estate, and it would be unfair to burden the estate with its administration: *Re E. J. E. Church Estate-Athole Church Trust*, 12 O.L.R. 18.

In taking the accounts all sums properly expended by the executors or administrators must be allowed to them.

In *Chisholm v. Barnard*, 10 Gr. 479, a retaining fee to a solicitor was allowed, as it was not, in the circumstances, an unreasonable disbursement for them to make in view of the trouble in conducting administration suits.

The funeral and testamentary expenses, the expenses of advertising for creditors, the necessary expenses of realizing the assets and paying them over, the debts of the deceased, and the legacies and bequests contained in the will are all proper and necessary expenditures.

The cost of a gravestone suitable to the station and estate of the deceased is a proper expenditure: *Menzies v. Ridley*, 2 Gr. 544; *Smith v. Rose*, 24 Gr. 439. The amount so allowed will depend on the position of the deceased, the amount of his estate, and the directions, if any, given by the will itself. In *Archer v. Severn*, 13 O.R. 316, the testator directed the erection of a suitable tablet, not to exceed \$1,500, over his grave, and also provided for the erection of monumental tablets or stones over the graves of his deceased wives. The executors removed the remains of the deceased wives to the same burial place as the testator was



interred in, and erected a monument to him and his wives at a cost of \$3,000. The whole estate amounted to \$200,000. The expenditure on the monument was allowed.

The allowance is regarded as a funeral expense: *Smith v. Rose*, 24 Gr. 439.

The amount of the allowance for funeral expenses made to the executor in passing his accounts depends, as against a creditor of the testator, on what is necessary, and a greater expenditure than is necessary will not be allowed. In determining what is necessary, regard must be had to the degree and condition in life of the party. In the case of a deceased captain in the army, the Court thought that £20 would be a proper sum for the funeral of a person in his degree and consideration in life, his estate being insolvent: *Hancock v. Podmore*, 1 B. & Ad. 260.

It was not, however, intended to lay down a rule that the sum of £20 should be the limit in all cases where the estate is insolvent, but that it was the proper limit in the circumstances of that case. The rule is to allow the executor reasonable expenses according to the testator's station in life. If a reasonable amount is exceeded the executor may be called upon to make it good.

The executors of a nobleman whose estate was supposed to be worth £40,000 at the time of his death, expended £2,210 on his funeral expenses. The estate, owing to shrinkage in the value of assets, and the discovery of unexpected liabilities, was unexpectedly found to be insolvent. The Court refused to allow the executors the amount they had expended, and referred it to the Master to determine what sum ought to be allowed, and stated that in a recent case at law the Court had refused to allow £69.

With respect to the obsequies, when the will gives no direction as to how they are to be performed, the Court has only to consider upon the evidence which the parties lay before it whether the sums allowed for their performance are more than have usually been expended at the funerals of persons of the same rank and fortune as the deceased. If they are more, and some mem-

bers of the family object to them, the Court ought not to sanction the expenditure: *Mullick v. Mullick*, 1 Knapp. 245.

“Upon the general question whether an executor procuring a gravestone or slab to the memory of his testator, suitable to his degree and estate, can charge the same against his estate, I do not think there can be much doubt. The charges attending a funeral are allowed to an executor (except as against creditors) even where the expenses are considerable, provided they are suitable to the degree and estate of the deceased, and they are allowed, not as being necessary, but because they are so suitable. They are sanctioned as customary marks of respect, as proper to be allowed, because they are so; and it does appear to me that the principle upon which such expenses are allowed applies with still more force and with better reason to an expense incurred, if not immoderate, for a permanent memorial of the deceased. Not only is it usual and considered a proper mark of respect, and its omission in some degree a reproach to survivors, but it is useful as marking the place of burial and as furnishing evidence of pedigree. But if it be proper and usual, that I conceive is sufficient to authorize an executor in incurring the expense, and therefore in being allowed for it out of the estate. In Roger’s Ecclesiastical Law, citing 3 Inst. 102, it is said ‘concerning the building or erection of tombs, sepulchres or monuments for the deceased in church, chancel, common chapel, or churchyard, it is lawful, for it is the last act of charity that can be done for the deceased;’ and in 2nd Comyn’s Digest, under the head ‘tomb, monument, etc.,’ it is said, ‘So an heir or executor may erect or set up a tombstone or other monument in a convenient place within the church or churchyard, for the honour of his ancestor there buried’ ”: *Menzies v. Ridley*, 2 Gr. 544, per Spragge, C.

The general rule is that upon the passing of accounts, all proper and necessary expenditures incurred in proving the will or taking out letters of administration, in passing the accounts and in the conduct of litigation, if properly entered into, even though unsuccessful, is allowed to the executor or other trustee out of

the estate: *Smith v. Beal*, 25 O.R. 368; *Pitts v. La Fontaine*, 6 A.C. 482; *In re Williams*, 22 A.R. 96.

But though a trustee, in the absence of misconduct, is entitled to be recouped his costs, charges, and expenses against the trust estate, even in the case of unsuccessful litigation, the costs of an unsuccessful appeal taken by him are not usually allowed: *Re Walters*, 34 Sol. J. 564; *Dillon v. Arkins*, 17 L.R. Ir. 636.

The rule as to the allowance of the costs of litigation out of the estate, presupposes a fund in the hands of the executor or trustee out of which the costs can be paid. An executor who takes upon himself to bring an action to recover a disputed sum, in which he is unsuccessful, cannot, in the event of the personal estate in his hands being insufficient to indemnify him against costs, be relieved from his misfortune by having his loss visited upon the devisee of the real estate: *In re Champagne*, 7 O.L.R. 537.

Where the executor, by his mismanagement, causes a suit, and but for the bringing of the suit the assets would have been dissipated, the executor will not, as a general rule, be allowed his costs out of the estate: *Simpson v. Horne*, 28 Gr. 1.

If an action is brought unnecessarily in the High Court by an executor for the purpose of having his accounts passed by that Court, his costs will be disallowed and he may be compelled to pay the costs of the defendant: *White v. Cummings*, 3 Gr. 602.

The usual rule is to allow executors, administrators and other trustees who have not been guilty of misconduct to pay their costs out of the estate as between solicitor and client, even though they have been unsuccessful in the litigation: *McKellar v. Pringley*, 25 Gr. 545.

## CHAPTER XXXVIII.

### REMOVAL INTO HIGH COURT AND APPEALS FROM SURROGATE COURTS.

In every case in which there is a contention as to the grant of probate or administration, the parties may agree to have the contention referred to, and determined by, the High Court upon a case to be prepared; and no grant is to be made by the Surrogate Court until the application to the High Court is disposed of.

In important causes or proceedings of a contentious character in which more than \$2,000 is involved, whether the contention is as to law or facts, a notice of motion may, at the instance of any party to the contention, be served upon the other parties thereto, for an order to transfer the cause or proceeding into the High Court. The motion must be based upon an affidavit disclosing the facts upon which the applicant relies for his order. The Judge who makes the order may impose terms as to security for costs or otherwise.

Upon the transfer of a cause or proceeding into the High Court, any question of fact may be tried by a jury. The High Court, upon the transfer, may deal with the cause or claim in the same way as if it had originated in that Court.

The final order or judgment is to be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court.

Upon the receipt of such final judgment or order, and the termination of the contest, the proceedings are continued and completed in the Surrogate Court as common form or non-contentious business: See the Surrogate Courts Act, sec. 2, sub-sec. 4.

When a cause or proceeding is removed into the High Court, under the thirty-fourth section of the Act (formerly the thirty-



first), the Judge of the Surrogate Court shall, upon the application of the party who has obtained the order for removal, in like manner as is mentioned in Surrogate Rule 59, direct the papers in the matter to be transmitted to the Surrogate Clerk, to be by him transmitted to the proper officer of the High Court: Surrogate Rule 60.

As in the great majority of instances the Registrar of the Surrogate Court is also local Registrar of the High Court, the only change is in the capacity in which he holds the papers, and no transmission is necessary.

Upon the transfer of the cause or proceeding into the High Court, all further proceedings must be conducted according to the procedure of the High Court. That Court is to deal therewith "as with any cause or claim originally entered in the said Court." Though the plaint in an English County Court is in some sense equivalent to a statement of claim, yet upon the transfer of an action from the County Court to the High Court, the action "shall thenceforth be continued and prosecuted in the said High Court as if it had originally been commenced therein," and "whatever might be the practice in the County Court, when the action was transferred into this Court, in order that justice might be administered between the parties, justice could only be administered according to the practice and after the rules of this Court, according to which the plaintiff is not entitled to discovery and production until he has delivered a statement of claim. There was no record, nothing to shew what were the matters in question in this action in respect to which the defendants were called upon to give discovery. When the plaintiff had delivered his statement of claim, and the defendants had had an opportunity of demurring or putting in a defence, the Court would then know what the matters in question were. Until that time the Court was quite in the dark." In the County Court, discovery might be obtained without pleadings, but the application for discovery, after the transfer of the action, was refused: *Davies v. Williams*, 13 Ch. D. 550.

After the transfer, all further proceedings must be entitled in the High Court, and all applications made there. The pleadings in the action, in so far as they are incomplete, must be completed according to the rules of the High Court. As appearance, and all subsequent proceedings in contentious matters, are governed by the rules of the High Court, the proceedings after the transfer, at whatever stage it is made, can be carried on without break or interruption to trial and judgment.

The sections of the Act relating to the transfer of causes and proceedings are as follows:—

“33. In every case in which there is contention as to the grant of probate or administration, and the parties in such case thereto agree, the contention shall be referred to and determined by the High Court on a case to be prepared, and the Surrogate Court having jurisdiction in the matter shall not grant probate or administration until the contention is terminated and disposed of by judgment or otherwise.

34. (1) Any cause or proceeding in the Surrogate Courts in which any contention arises as to the grant of probate or administration or in which any disputed question may be raised (as to law or facts) relating to matters and causes testamentary, shall be removable by any party to the cause or proceeding into the High Court by order of a Judge of the said Court, to be obtained on a summary application supported by affidavit, of which reasonable notice shall be given to the other parties concerned.

(2) The Judge making the order may impose such terms as to payment or security for costs or otherwise as to him seems fit; but no cause or proceeding shall be removed unless it is of such nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the High Court, nor unless the property of the deceased exceeds \$2,000 in value.

35. Upon any cause or proceeding being so removed the High Court shall have full power to determine the same, and may

cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court; and the final order or judgment made by the said Court in any cause or proceeding removed as aforesaid, shall, for guidance of the Surrogate Court, be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court from which the cause or proceeding was removed.”

The orders, sentences and judgments of Surrogate Courts are appealable. So also are the decisions of the Judges thereof upon points of law. But the amount involved must in either case exceed \$200. The right of appeal is given by section 36 of the Act, and is subject to the conditions of that section, and so subject also to the rules and orders made under section 88 of the Surrogate Courts Act.

The appeal, at the time the present Surrogate Rules were adopted, was, under the statute then in force, to the Court of Appeal, but since 58 Viet. ch. 13, sec. 45, the appeal is to a Divisional Court. Some confusion ensued for a time in consequence, but the decisions of the High Court have now removed a number of the difficulties.

The section of the Act referred to was, at the time the rules were made, the 33rd in the Act then in force; the corresponding section now is the 36th. As amended by 4 Edw. VII. ch. 10, sec. 16, which added sub-section 2, it is as follows:—

“36. Any person considering himself aggrieved by any order, sentence or judgment of a Surrogate Court, or being dissatisfied with the determination of the Judge thereof in point of law in any matter or cause under this Act, may, within fifteen days after such order, sentence, judgment, or determination, appeal therefrom to a Divisional Court of the High Court, in the manner, and subject to the regulations provided for by the rules and orders respecting the Surrogate Courts heretofore in force; or by rules or orders made under this Act; and the said Court shall hear and determine such appeal; but no such appeal shall be had or lie unless the value of the property, goods, chattels, rights or

credits to be affected by such order, sentence, judgment, or determination exceeds 200.

Section 36 of the Surrogate Courts Act is amended by adding thereto the following sub-section:—

(2) A Divisional Court shall have power subject to Rules of Court to extend the time for appealing or for setting down the appeal to be heard or for giving notice of the hearing of the appeal, and may also extend the time for doing any act or taking any proceeding in or in relation to the appeal as to the said Court may seem just. 4 Edw. VII. c. 10, s. 16."

The rules referred to are as follows:—

*Appeals to the Court of Appeal.*

57. Appeals under the 33rd section of the Act [now the 36th] shall be subject to the following regulations:—

In case any person desires to appeal from any order, sentence, judgment or decree of a Surrogate Court, or from the determination of the Judge thereof on any point of law:—

1. He (or, in the case of his absence, some one on his behalf) shall, with two sufficient sureties, execute a bond to the respondent in the sum of two hundred dollars, to the effect that the appellant will effectually prosecute his appeal, and pay such costs, charges and expenses as shall be awarded in case the order, sentence, judgment, determination or decree (as the case may be) shall be affirmed, or in part affirmed.

2. The sureties to such bond shall make affidavit as to their sufficiency.

3. An affidavit of the execution of the said bond shall be made by the subscribing witnesses thereto.

4. An affidavit shall be made by the appellant, his solicitor or agent, that the property to be affected by such order (or decree, or as the case may be) is over the value of two hundred dollars.

5. The said bond and affidavits shall be filed with the Registrar of the Surrogate Court.



6. A notice of such appeal shall be served by the appellant on the opposite party, his solicitor or agent.

7. If such bonds and affidavits be made and filed, and such notice be served within fifteen days next after the order, sentence, judgment, decree, or determination appealed against, the appeal shall be held by such Surrogate Court to be duly lodged.

8. In lieu of giving the above-mentioned bond, the appellant shall be at liberty to pay into the proper Surrogate Court, as security, a sum of money not less than \$100.

Rule 57 of the Surrogate Rules of 1892 requires security for the prosecution of the appeal, and for the costs thereof, in case of failure, to the amount of \$200, to be given by bond with justifying sureties, and also requires an affidavit to be filed that the property to be affected by the order complained of is over the value of \$200. It then provides that if such bond and affidavits be made and filed, and if a notice of appeal be served within fifteen days after the making of the order, the appeal shall be held to be duly lodged. It is then provided that the appellant may pay into Court a sum of money not less than \$100 in lieu of the prescribed bond. After all that is done the papers in the case are to be transmitted. Notice of appeal was duly served in *Re Wilson*, 17 P.R. 407, on the fifteenth day. On the same day a cheque on a bank signed by the solicitors of the appellants, and payable to the order of the Clerk of the Court, was filed in the office, where it remained. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed. The Court of Appeal thought it impossible to hold that what was done was such a compliance with the requirements of the rule that the appeal was thereby lodged, or brought within fifteen days, as allowed by the statute. The appeal was therefore quashed with costs.

Though the rules are in terms applicable to appeals to the Court of Appeal, they apply to appeals to the Divisional Court under the amended statute, and an appeal to a Divisional Court from an order of a Surrogate Court will be quashed unless secur-

ity has been duly given and an affidavit of the value of the property affected filed, as required by the rules. The practice upon appeals under the Surrogate Courts Act is not affected by the fact that by Consolidated Rule 825 of the Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario "no security for costs shall be required on a motion or appeal to a Divisional Court": *Re Nichol*, 1 O.L.R. 213.

Notwithstanding that the statutory provision authorizing the payment of compensation to executors and administrators is contained in the Trustee Act, R.S.O. 1897, ch. 129, sec. 43, and that the right of appeal from the Surrogate Court as given by the Surrogate Courts Act, R.S.O. 1897, ch. 59, sec. 36, the two sections have a common origin, and are in *pari materia*. The Surrogate Judge in making an allowance to executors and administrators does not act as *persona designata*, and the order, if it involves a sum in excess of \$200 is appealable: *In re Alexander*, 31 O.R. 167.

The decision of a Divisional Court upon an appeal from a Surrogate Court or a Surrogate Judge is, in some cases, appealable. An appeal is given to the Court of Appeal from a Divisional Court, by 4 Edw. VII. ch. 11, sec. 2, in the following cases:

(a) Matters of account or distribution where the amount in question is the sum or value of \$1,000, exclusive of costs.

(b) Where a proceeding might have been removed into the High Court, under the provisions of section 34 of the Surrogate Courts Act, and then only if leave to appeal shall have been obtained as therein provided.

Such leave may be given by a Divisional Court, or a Judge of the High Court, if a Divisional Court is not sitting, or by the Court of Appeal, or a Judge thereof if the Court of Appeal is not sitting.

## CHAPTER XXXIX.

### COSTS.

The applicant for probate, letters of administration or guardianship may apply either personally or by solicitor. But no person other than a solicitor can prepare papers and make applications to the Surrogate Court for any purpose on behalf of any other person.

Upon an application for a grant of probate, administration or guardianship, the costs will consist of four different elements: (a) the fees payable to the Crown as a part of the revenue of the province; (b) the fees of the Judge of the Court, to which he is entitled by the statute in addition to his salary as Judge; (c) the fees of the Registrar of the Surrogate Court; and (d) the fees of the solicitor for his professional services.

The fees payable to the Crown are, by section 80 of the Surrogate Courts Act, payable in stamps. The stamps payable in respect of a grant of probate or administration are affixed, not to the probate or letters of administration, but to the order for the grant. The fees payable under the statute are based on the amount of what was, before the Devolution of Estates Act, personal property. Section 82. This applies to the fees payable to the Crown and also to the fees payable to the Judges.

The fees payable to the Crown are set out in Schedule A. to the Act, as amended by 1 Edw. VII. ch. 12, sec. 8. They are as follows:—

#### SCHEDULE A.

(Sec. 80.)

##### FEES PAYABLE TO THE CROWN.

##### *On Proceedings in the Offices of Registrars.*

On every application for probate or administration, or for guardianship (including notice thereof to Surrogate Clerk, but not postage) . . . . . \$0 50

On certificate of Surrogate Clerk upon such application (including transmission to Registrar, but not postage) . . . . .	\$0 50
On every instrument or process with seal of Court. . . . .	0 50
Entry and notification of caveat, not including postage. . .	0 50
On every grant of probate or administration as follows, viz.:	
Where the property devolving is under \$1,000. . . . .	0 50
For every additional \$1,000. . . . .	0 50
On every final judgment in contentious or disputed cases. .	1 00
On deposit of wills for safe custody, each. . . . .	0 50
<i>On Proceedings in the Office of the Surrogate Clerk.</i>	
a. On every search for grant of probate, administration, guardianship, or other matter in Clerk's Office (other than searches on application of Registrars). . . . .	0 50
b. On every certificate of search or extract. . . . .	1 00
(If exceeding three folios, 10 cents for each additional folio.)	
c. On every certificate respecting other application or caveat, when necessary search does not extend beyond three years. . . . .	0 50
(When the necessary search extends beyond three years, 10 cents additional for every year beyond three years.)	
d. On every certificate, when the whole estate does not exceed in value \$400; or when the estate consists of insurance money only, not exceeding \$400. . . . .	0 30
e. On every other certificate issued by the Surrogate Clerk. . . . .	0 50
f. On every order made on application to a Judge in the High Court, and transmission of same, exclusive of postage. . . . .	0 80
g. On entry of every appeal. . . . .	1 00



- h. On every judgment on appeal and transmission, exclusive of postage ..... \$3 00
- i. On entry of caveat..... 0 50
- j. On every judgment or order on appeal..... 2 50

By section 81 of the Surrogate Courts Act, the Judges are entitled to the fees set out in Schedule B. to the Act. These fees are collected by the Registrars, and are by them paid over to the Judges. The Registrars are also required to make an annual return of these fees on or before the 1st day of February.

#### SCHEDULE B. (As amended by 3 Edw. VII. ch. 7, sec. 13.)

(Sec. 81.)

##### FEES ALLOWED TO JUDGE.

- On every grant of probate or administration:—
  - Where the property devolving is under \$1,200..... \$2 00
  - Where the property devolving is from \$1,200 to \$3,000. .... 3 00
  - Where the property devolving is from \$3,000 to \$4,000..... 4 00
  - And for every additional \$1,000, the additional sum of..... 1 00
- On every appointment of a guardian..... 2 00
- On every order or appointment..... 0 50
- On every special attendance or attendance upon an appointment when the audit is adjourned..... 1 00
- On every audit, where the total of the accounts to be audited is under \$1,000..... 1 00
  - per hour, but not more than \$2.00 on any day.
- On every audit where such total exceeds \$1,000, but is under \$10,000. .... 1 00
  - per hour, but not to exceed \$5.00 on any day.
- On every audit where such total exceeds \$10,000, but is under \$50,000. .... 1 50
  - per hour, but not to exceed \$6.00 on any day.

On every audit where such total exceeds \$50,000..... \$2 00  
per hour, but not to exceed \$10.00 on any day.

For every day's sittings in contentious or disputed cases, similar fees to those allowed in cases of audit.

These fees are not payable to the Crown and to Surrogate Judges on real estate; and lands which the testator directs his executors to convert into money are not thereby rendered liable for such fees: *Jane Barden*, 1 P. & D. 325. If, however, the land was conveyed under a settlement, in trust to sell the same in such a way that in the lifetime of the testator the land would be considered as converted in equity, and to be dealt with as personalty, then it would be subject to such fees: *Gunn*, 9 P.D. 242.

The Judges and Registrars of the several Surrogate Courts, and the solicitors practising therein, are entitled to take for the performance of duties and services under the Succession Duty Act similar fees to those payable to them under and by virtue of the Surrogate Courts Act and Rules for similar proceedings. Section 83 of the Surrogate Courts Act applies to the fees of the Surrogate Court Judge under this Act. See section 21 of the Succession Duty Act.

The financial agent of the Presbyterian Church in Canada was entrusted with its funds, as there was no committee or corporation entitled to hold them. He left two wills, one dealing with his individual estate, and the other with the real and personal property which he held in trust for the church. The executors of the latter will were directed to hold them on the same trusts as he held them upon, and to dispose of them as the General Assembly of the Church might direct. Both wills were admitted to probate as together constituting the last will of the testator. But as the trustee was a bare trustee, having or transmitting no beneficial interest in the property, and his estate had no surviving interest therein, it was objected on behalf of the executors of the trust property that no fees were payable to the Crown or to the Judge under the Surrogate Courts Act on the

trust property. It was contended that the property did not "devolve" within the meaning of the Act, for the purpose of being administered. It was held that the fees were not chargeable, as the testator had no beneficial interest in the trust estate, and could confer no beneficial interest therein, but merely passed the like estate to other trustees. Reference was made upon the argument to *Platt v. Routh*, 6 M. & W. 756; *Drake v. Attorney-General*, 10 Cl. & F. 257; *Re Griffiths*, 14 M. & W. 510; *Re Booth's Trusts*, 16 O.R. 429; *Re Reid*, 32 C.L.J. 200.

When the fees payable to the Surrogate Judge have been commuted for a fixed annual sum, the fees are still payable, but they are paid in stamps.

When the fees payable to a Surrogate Judge exceed the sum of \$1,000, a sum not exceeding \$666 may, on the authority of an Order-in-Council, be paid out of the excess to the Junior Judge, if any, of the county, whether there has or has not been a commutation of fees as regards the Senior Judge. See section 84.

Where another Judge acts for a Surrogate Judge, he is not entitled to the fees unless with the consent of the Surrogate Judge. 61 Vict. ch. 14, sec. 2.

Section 86 of the Surrogate Courts Act empowers the Board of County Judges mentioned in section 305 of the Division Courts Act to make tables of fees and costs to be taken by the Registrars and other officers of the Surrogate Courts, and to be allowed to solicitors and counsel practising in such Courts, and also to witnesses therein.

These tables of fees and costs have been prepared as schedules to the Rules prepared by the said Board under section 88 of the Act, and approved by the Judges of the Supreme Court of Judicature. They will be found in the appendix.

Section 21 of the Act Respecting Infants, R.S.O. 1897, ch. 168, gives the Board of County Judges similar powers in regard to guardianship and the custody of infants, and the tables of charges are given after the Rules Relating to Guardianship in the appendix.

When estates are of small value, special provisions are made by the Surrogate Courts Act to avoid expense. When the whole estate and effects, real and personal, of the deceased do not exceed in value \$400, his widow, child or children, next of kin, or his executors or trustee, or the solicitor of any of them, may apply to the Judge of the Surrogate Court of the proper county, and the Registrar of the Court must fill up the necessary papers to lead grant of probate or administration, and administer the necessary oaths, and attest the administration bond. He is also required to transmit the necessary notice to the Surrogate Clerk, and on the Judge's order he is to seal the grant of probate or administration. Section 74. The whole of the fees payable in regard to such estates is not to exceed \$2. Section 76.

Section 75 enables the Judge to enquire as to the identity and relationship of the applicant and the value of the estate.

Section 77 of the Act reduces the fees payable in non-contentious proceedings where the whole value of the estate exceeds \$400, but does not exceed \$1,000, to one-half of the fees payable on the 5th day of May, 1894. The tariff of fees appended to the Rules came into force on the 1st day of April, 1892.

By 3 Edw. VII. ch. 7, sec. 32, section 21 of the Act Respecting Infants is amended as to the costs in guardianship and other matters under that Act, by adding sub-section 2:—

(2) "The fees to be charged to applicants where the whole estate and effects do not exceed in value the sum of \$400 shall not in any one case exceed the sum of \$2."

It sometimes happens that a barrister or solicitor is a trustee, executor or administrator. In such cases, if he acted in his professional capacity for himself and his co-trustees, co-executors or co-administrators, he was entitled to costs only in litigious matters, unless some special provision was made in the will or other document appointing him, to enable him to charge profit costs: *Craddock v. Piper*, 1 Mac. & G. 664; *Re Corsellis*, 34 Ch. D. 675;



*Re Mimico Sewer Pipe Co.*, 26 O.R. 289. The principle applies to counsel fees as well: *Strachan v. Ruttan*, 15 P.R. 109.

But now, by 3 Edw. VII. ch. 7, sec. 27, sub-sec. 2 has been added to section 43 of the Trustee Act, as follows:—

“Where a barrister or solicitor is a trustee or an executor or an administrator, and has rendered necessary professional services to the estate, regard may be had in making the said allowance to such circumstance, and such allowance shall be increased by such amount as the Court, Judge, Master or Referee may consider to be fair and reasonable in respect of such necessary professional services; provided nothing in this section shall affect pending litigation.”

Even before the amendment the solicitor's bill of costs was sometimes allowed as part and parcel of his remuneration as executor or trustee: *Re Leckie*, 36 C.L.J. 136.

Under the English Rules costs are in the discretion of the Court; but when the action or issue is tried by a jury the costs follow the event, unless for good cause the Judge by whom the action is tried otherwise orders. But nothing contained in the Rules is to deprive a trustee or mortgagee who has not unreasonably instituted, carried on or resisted any proceedings, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules acted on in equity: Order 65, Rule 1.

In the Prerogative Courts, costs were in the discretion of the Judge, and the practice was continued in the Court of Probate. The practice of the latter Court as it existed on the 5th day of December, 1859, was introduced into Ontario: Section 37 of the Surrogate Courts Act.

In England the party opposing the will in a probate action may give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses adduced in support of the will, and he shall thereupon be entitled to do so, and shall

not, in any event, be liable to pay the costs of the other side unless the Judge shall be of opinion that there was no reasonable ground for opposing the will. Order XXI. sec. 18, as amended August, 1898.

In Ontario, in the same circumstances, the party so cross-examining is "subject to liability in respect of costs in the discretion of the Judge": Contentious Rule 6. Before the amendment of 1898, in England, the defendant was subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Court of Probate.

Under the present English Rule, a defendant who opposes a will without reasonable ground must pay the costs of the other side. Before that Rule was amended a defendant might skirmish at no risk of costs, and at expense to the estate: *Spicer v. Spicer* (1899), P. 38. It does not follow at all that, because a defendant fails, there was no reasonable ground. It may not be unreasonable to ask to have the witnesses to the execution state on oath what took place, and to be cross-examined as to their recollection of the matter. In such case there may be no order as to costs: *Davies v. Jones* (1899), P. 161.

But in the Prerogative Court, when an executor had been called upon by a next of kin to prove the will *per testes*, and had sufficiently proved it, if the party calling for such proof merely cross-examined the witnesses in support of the will, he was not as a general rule liable for costs: *Reeves v. Treeling*, 2 Phillim. 56; *Urquhart v. Tricker*, 3 Add. 56. But if the next of kin had been guilty of vexatious conduct in enforcing his right to have the will proved in solemn form, he thereby became liable for the costs of the executor or other person propounding the will. For instance, if he acquiesced in the probate in common form and received his legacy, and, after a long interval, cited the executor to prove the will in solemn form, he may be charged with the executor's costs: *Bell v. Armstrong*, 1 Add. 375. So, too, after seven years' acquiescence, there being no ground to doubt

the validity of the will: *Wagner v. Mears*, 2 Hagg. 524. But a legatee under a former will is less favoured than the next of kin, and called for proof of a will in solemn form at the risk of having to pay the costs, if the Court thought that his proceedings were not fully justified: *Hockley v. Wyatt*, 7 P.D. 239.

The next of kin were favoured by the Court in the matter of costs when merely cross-examining the witnesses in support of the will. So, also, was an executor who had taken probate of a former will, or a creditor who had obtained a grant of administration, when he opposed a later will: *Boston v. Fox*, 29 L.J.P. M. & A. 68. But if when he took probate of the earlier will the executor knew of a later will, costs would be given against him.

When there were reasonable grounds for the litigation, the next of kin, even if he called witnesses to disprove the will, was not ordered to pay costs; he escaped payment of the costs by reason of there being reasonable ground for the litigation: *Tippett v. Tippet*, 1 P. & D. 54; *Smith v. Smith*, 1 P. & D. 239.

If fraud or undue influence was charged, and was not proved, the next of kin opposing the will was condemned in the costs of the party propounding the will: *Harrington v. Bowyer*, 2 P. & D. 264; *Ireland v. Rendall*, 1 P. & D. 194. Even an executor who propounds a will in such circumstances as to serve no good purpose, and thereby gives rise to needless litigation, will be required to pay the costs: *Cottrell v. Cottrell*, 2 P. & D. 397.

There were certain rules or principles laid down in the cases decided in the Prerogative Court, and followed in the Court of Probate.

One of these was that an executor who proves a will in solemn form, whether of his own motion, or at the instance of some person having an interest, is entitled to his costs out of the estate without an order of the Court for them. All the expenses incidental to proving a will are properly a charge on the estate. But if he acts improperly he may be condemned in costs; for example, if he consents to a verdict against him on the morning of

the trial: *Richards v. Humphries*, 29 L.J.P. & M. 137; or if he propounds a will knowing that it is invalidly executed: *Clarkson v. Waterhouse*, 29 L.J.P. & M. 136; or if an inofficious instrument is put forward by an executor who is materially interested under it: *Dodge v. Meech*, 1 Hagg. 612. If an executor unsuccessfully propounds a will, though in good faith, where there is no reasonable ground for the litigation, he may be condemned to pay the costs though he be but a nude executor. He is not bound to propound the testamentary paper, if he does not like to do so, and in a case of doubt he may not unreasonably require those interested in upholding the will to indemnify him against costs. If an executor were not liable for costs, any one who wished improperly to set up a testamentary paper would be able to do it under the shield of an executor, without the risk of costs: *Rennie v. Massie*, 1 P. & D. 118.

A legatee who propounds a will or a codicil is entitled to the same costs as an executor out of the estate. The order will direct them to be paid *nomine expensarum*: *Wilkinson v. Corfield*, 6 P.D. 27; *Williams v. Goude*, 1 Hagg. 610; *Thorne v. Rooke*, 2 Curt. 831; *Sutton v. Drax*, 2 Phillim. 323. But see *Headington v. Holloway*, 3 Hagg. 280.

He has not, like an executor, the right to pay himself out of the estate, unless he takes out administration, and thereby obtains the custody of the estate. The executor, though he has been cited to propound the will, and has not done so, may, nevertheless, if he has not renounced, come in when the will has been established, and take probate, the proceedings after the contest has terminated being in common form. Or the residuary legatee, on the executor's failure to take probate, may come in and take letters of administration with the will annexed, in priority to a mere legatee: *Brewsher v. Williams*, 3 Sw. & Tr. 62.

The legatee or next of kin who causes the will to be proved in solemn form without being himself entitled to probate, should apply to the Court to include in the judgment to establish the



will, an order for payment of the costs of establishing the will out of the estate. The application should be made upon the Court pronouncing for the validity of the will. But the order has been made subsequently, upon an application by the legatee who propounded the will, no order as to costs having been made when the decree of the Court was pronounced: *Brewsher v. Williams*, 3 Sw. & Tr. 62.

Where executors have obtained a judgment in favour of the validity of a will, and a new trial was granted at the instance of parties who had appeared, but had not pleaded before the first trial, the Court ordered their costs of the first trial to be paid to the executors out of the estate: *Boulton v. Boulton*, 1 P. & D. 456. See also *Wilson v. Wilson*, 22 Gr. 39.

Additional costs incurred by the negligence of the executor must be borne by him. For instance, if he loses the will, and has to prove a draft of it, he must pay the costs of the defendants, and he is entitled only to such costs as he would have had, if he proved the will in solemn form: *Burls v. Burls*, 1 P. & D. 472.

The Ecclesiastical Courts sometimes, in exceptional circumstances, directed the costs of all parties to be paid out of the estate of the deceased. It was not, however, sufficient ground for the payment of the costs of both parties out of the estate that there was reasonable ground for litigation: *Barwick v. Mullings*, 2 Hagg. 234. But where a party entitled in distribution simply calls for proof of a will, and does nothing further than to cross-examine the witnesses, without any misconduct in the suit, he is entitled to have his costs out of the estate, if his aim is only to get the opinion of the Court on the will: *Princess v. Dyce Sombre*, 10 Moo. P.C. 232. Two questions arise: Under the circumstances known to the persons who ask to have the will propounded, was it fit that its validity should be submitted to legal investigation; and, if so, was there anything in the conduct of the parties instituting the proceedings, either before or since the contest arose, which ought to subject them to the penalty of costs: *Ib.*, p. 301.

If the cause of litigation originates in the fault of the testator, the costs of all parties may properly be ordered to be paid out of the estate. If, for instance, the executor is so inaccurately described in the will that it is uncertain who is intended, the costs should be paid out of the estate: *Charter v. Charter*, L.R. 7 H.L. 364; or, if it is uncertain whether the testator intended by a later will wholly to revoke an earlier one: *Jenner v. Ffinch*, 5 P.D. 106. When the litigation arises from the condition in which the testator leaves his testamentary papers, and the interests of the parties represented at the hearing are different, the costs of all parties must be borne by the estate: *Ib.*, p. 114. On that principle the executor who propounds a will, the facts within his knowledge at the time he does so not going further than to shew eccentricity on the part of the testator, and he being totally ignorant of the testator's insanity, is entitled to his costs out of the estate, though the jury find the will to be void by reason of the testator's insanity: *Boughton v. Knight*, 3 P. & D. 64.

If the cause of litigation was in the conduct of the persons entitled to the residue of the estate, the same rule was applicable: *Williams v. Heneny*, 3 Sw. & Tr. 471.

If there was sufficient and probable reason, having regard to the sources of information open to the person attacking the will, and the knowledge which he actually had, to question the validity of the will, either by reason of defective execution, incapacity on the part of the testator, undue influence or fraud, the losing party may escape payment of the costs of the successful litigant. If the conduct, habits and mode of life of the testator give reasonable ground for questioning his capacity to make a will, the costs of all parties come out of his estate. But if neither the testator by his conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, though the opponents of the will, after due inquiry, entertained a *bona fide* belief in the existence of a state of things which, if it did exist, would justify the litigation, and

the opposition is unsuccessful, each party must pay his own costs, those of the executors who propound the will being payable out of the estate: *Davies v. Gregory*, 3 P. & D. 28; *Roe v. Nix* (1893), P. 55.

In *Orton v. Smith*, 3 P. & D. 23, the Court allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence and fraud, the mode in which the executor had executed the will and the conduct of the persons beneficially interested being such as to reasonably excite suspicion and doubt.

If the litigation has been caused by the misrepresentations of the successful litigant, and by the withholding of information by her solicitor from those in the opposite interest, which, if communicated, would have cleared up the point in dispute, costs will not be given against the unsuccessful party, though the general rule in interest suits is to condemn the unsuccessful party in costs: *Wiseman v. Wiseman*, 1 P. & D. 351.

In the practice of the Prerogative Court, the person who unsuccessfully propounded or contested the will was in some circumstances, especially in later times, allowed his costs out of the estate: *Dean v. Russell*, 3 Phillim. 334.

(a) If the party was led into the contest, whether as plaintiff or defendant, by the conduct of the testator or the state in which he left his testamentary papers: *Hillam v. Walker*, 1 Hagg. 75; *Blake v. Knight*, 2 Notes of Cases 346; *Abbott v. Peters*, 4 Hagg. 381; *Armstrong v. Huddleston*, 1 Moo. P.C. 491; *Barwick v. Mullings*, 2 Hagg. 234; *Princep v. Dyce Sombre*, 10 Moo. P.C. 232; *Charter v. Charter*, L.R. 7 H.L. 364; *Jenner v. Ffinch*, 5 P.D. 106; *Boughton v. Knight*, 3 P. & D. 64.

An executor is *prima facie* justified in propounding a will. Yet if it is made to appear that, when propounding it, he must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he ought to be condemned in costs. It would be unjust to hold otherwise.

But when the testator seemed to all outward appearance to be capable of managing his affairs, in the absence of evidence to the contrary, the executor is justified in bringing the case before the Court, and upon his failure in such a case to establish the will, the costs of both sides should be paid out of the estate: *Boughton v. Knight*, 3 P. & D. 64.

(b) Where the conduct of the residuary legatee or of the party principally benefited by the will gave rise to the contest: *Williams v. Henery*, 3 Sw. & Tr. 471; *Browning v. Budd*, 6 Moo. P.C. 430.

(c) Where the validity of a will had been contested on a doubtful point of law: *Robins and Paxton v. Dolphin*, 1 Sw. & Tr. 518; *Brooke v. Kent*, 3 Moo. P.C. 334.

(d) Where there was reasonable doubt as to the testamentary capacity of the testator, the Court might, in its discretion, having regard to all the circumstances, direct the costs of all parties to be paid out of the estate. Thus, where a testator who was eccentric in an extraordinary degree, and had taken an unfounded dislike to his relations, and whose moral feelings were perverted, left his property to charity, his sister and sole next of kin was allowed her costs of an unsuccessful attempt to defeat the will for lack of testamentary capacity: *Frere v. Peacock*, 1 Robert. 456.

Costs out of the estate were awarded to the unsuccessful party where the attesting witnesses gave conflicting accounts as to the due execution of the will: *Ferrey v. King*, 3 Sw. & Tr. 51; or where the Judge before whom the cause was tried would have been satisfied with a contrary verdict: *Bramley v. Bramley*, 3 Sw. & Tr. 430; or where the next of kin opposed the will on information given by the medical witness to the execution of the will that the testator assented to the will by gestures only when it was read over to him, and that he could not swear that the testator was of sound mind: *Tippett v. Tippett*, 1 P. & D. 54.



(e) When a case, from its peculiar circumstances, pre-eminently calls for investigation, the unsuccessful party may be awarded his costs out of the estate: *Jones v. Godrich*, 5 Moo. P.C. 16.

In practice the unsuccessful party was ordinarily condemned in costs if by his plea or his cross-examination he attempted to make a case of fraud or conspiracy not justified by the evidence, even though the circumstances were such as to justify him in calling for proof of the will, and watching and sifting that proof: *Barry v. Butlion*, 2 Moo. P.C. 480, at p. 492. The same result follows if inquiries would have removed all the grounds of suspicion upon which the person contesting the will had based his opposition: *Nichols v. Binn*, 1 Sw. & Tr. 239; or if the disclosures made during the course of the litigation should have prevented him from proceeding further in it: *Dean v. Russell*, 3 Phillim. 334.

An executor who is the principal beneficiary under a will propounded by him; and against whom there is suspicion of fraud, if he fails to establish the will may be condemned in costs: *Dodge v. Meech*, 1 Hagg. 612; *Saph v. Atkinson*, 1 Add. 162. So, too, where the will has been unduly obtained from the testatrix by her husband, who unsuccessfully propounds it as executor: *Baker v. Batt*, 1 Curt. 172; *Marsh v. Tyrrell*, 2 Hagg. 141.

The charge of undue influence or fraud, if improperly made, is usually visited with the costs of the other side: *Ireland v. Rendall*, 1 P. & D. 194; *Harrington v. Bowyer*, 2 P. & D. 264; but it is otherwise if he merely pleads that the testator did not know and approve of the contents of the will: *Cleare v. Cleare*, 1 P. & D. 655. But if the defendant contest the will without reasonable grounds, he must pay costs: *Archer v. Burke*, 1 P. & D. 558. If the conduct of the testator and of those supporting the will gives rise to reasonable grounds of suspicion, costs will not be awarded: *Orton v. Smith*, 3 P. & D. 23.

The party who unsuccessfully attacks a grant of probate in

order to have it rescinded, is usually visited with costs. In the view of the Prerogative Court, as well as of the Probate Division, it is the right of a party having interest to oppose a will, to insist on the will being proved in solemn form of law, and if he gives notice with his plea that he only intends to cross-examine the witnesses, he is entitled to do so without being liable to any costs whatever. The exception to the rule is where there is not merely opposition to a will, but where probate has been called in by the parties with a view to having it rescinded. A party unreasonably and improperly requiring probate to be called in may be condemned in costs: *Leigh v. Green* (1892), P. 17; *Beale v. Beale*, 3 P. & D. 179.

The notice of intention to only cross-examine the witnesses may be conditional, and the intention not to go further may be made to depend on the production of both of the attesting witnesses by the party propounding the will: *Leoman v. George*, 1 P. & D. 542.

If the next of kin would in the circumstances have been entitled to a decree for costs out of the estate, yet if the Court is satisfied that he has put the executor to the proof of the will *per testes*, not to obtain the opinion of the Court on its validity, but to obtain evidence which might be available in another action, he may be refused his costs: *Swinfin v. Swinfin*, 1 Sw. & Tr. 283.

The heir-at-law has the same privileges as to costs as are enjoyed by the next of kin: *Fyson v. Westropp*, 1 Sw. & Tr. 279. When the next of kin contested the will, and the heir-at-law intervened, not having been cited, and the will was pronounced against on account of the testator's incapacity, the party propounding the will was condemned in the costs of the next of kin and of the heir-at-law: *Rayson v. Parton*, 2 P. & D. 38.

An intervener who comes in to support the executor in upholding the will is not, in an ordinary case, allowed his costs out of the estate: *Colvin v. Frazer*, 2 Hagg. 368.

Next of kin who intervened in respect of alterations in the will

affecting their interests were allowed their costs in *Burgoyne v. Showler*, 1 Roberts. 5, though the alterations were pronounced invalid.

If the intervener has been cited and charged with undue influence by the defendants, upon the failure of the defendants' contention, the intervener and the plaintiff may both be accorded costs against the defendants: *Tennant v. Cross*, 12 P.D. 4.

One uselessly intervening may, though his contention succeeds, be refused costs out of the estate: *Shaw v. Marshall*, 1 Sw. & Tr. 129.

The Court has power to condemn one who has been cited but has not appeared, in the costs of a testamentary suit, if such person has wantonly destroyed the will, and thereby caused the litigation: *King v. Gillard*, 1 P. & D. 539.

An old order of the Prerogative Court made in 1830 provided that, in all cases, the Prerogative Court might, upon application made to it, direct security for costs to be given by either or all the parties. Under that order, the next of kin who, being absent from England, had entered an appearance in opposition to the propounding of the will, was ordered to give security for costs: *Hillam v. Walker*, 1 Hagg. 72. So, too, a party propounding a will, having become bankrupt, was ordered to give security for costs: *Goldie v. Murray*, 2 Curt. 797.

The Court of Probate adopted the rules of the Courts of common law, and required security from a plaintiff who was absent from the jurisdiction, but not from the defendant, or from a person who was practically the defendant: *Robson v. Robson*, 3 Sw. & Tr. 568.

In Ontario in contentious matters the practice of the High Court is followed, consequently security for costs will not be required of a defendant who resides out of the jurisdiction: *Ward v. Benson*, 2 O.L.R. 366. But where both of the litigants are actively asserting their title to a fund, and both are out of the

jurisdiction, security for costs may be required from both parties: *Sinclair v. Campbell*, 2 O.L.R. 1; *In re La Compagnie Générale d'Eaux Minérales* (1891), 3 Ch. 451.

Section 87 of the Surrogate Courts Act provides that "The bill of any solicitor for any fees, charges or disbursements in respect of business transacted in a Surrogate Court, whether contentious or otherwise, or any matter connected therewith, shall, as well between solicitor and client as between party and party, be subject to taxation in such Surrogate Court, and the mode in which the bill shall be referred for taxation, and the person by whom the costs of taxation shall be paid, shall be regulated by the rules and orders now in force or to be hereafter made under this Act, and the certificate of the Registrar of the amount at which the bill is taxed shall be subject to appeal to the Judge of the Court."

Surrogate Court Rule 72 is: "The Registrar shall tax costs, subject to appeal to the Judge."



## CHAPTER XL.

### SUCCESSION DUTY.

The Succession Duty Act came into effect in Ontario on the 1st day of July, 1892, and applies only to the estates of persons dying after that date. Some subsequent amendments are applicable only to the estates of persons dying after the amendments came into force.

The Act defines "property," "child," "aggregate value," and "dutiable value."

"Property" includes both real and personal property, and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives. This is an amplification of the ordinary meaning of the word property, rather than a definition. "Includes" imports addition, and is properly used to denote that the words following it are an addition to the ordinary meaning of the term. Jarman on Wills, 5th ed., p. 1090; *Re Harkness* (1905), 8 O.L.R. 720.

"Child" includes:—

- (a) A lawful child of the deceased.
- (b) Any lineal descendant of such child.
- (c) Any person adopted before the age of twelve years by the deceased as his child.
- (d) Any infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent.
- (e) Any lineal descendant of the adopted child or infant referred to in (c) or (d) born in lawful wedlock.

It is noticeable that the "child" is a *lawful* child, and the lineal descendant of an adopted child or of an infant to whom

the deceased for ten years stood in *loco parentis*, must have been born in lawful wedlock, but the Act is silent as to the legitimacy of the lineal descendant of a lawful child.

“Aggregate value” is the value of the “property” after the debts, encumbrances or other allowances properly made in reduction of the total value have been subtracted. It includes property situate outside of the province as well as property situate within it. The allowances are for funeral expenses and for debts or encumbrances incurred: (a) *bona fide*; (b) for full consideration in money or money’s worth; (c) wholly for the deceased’s use and benefit, and (d) to take effect out of his interest; but not for debts in respect of which there is the right of reimbursement from some other person or estate, unless reimbursement cannot be so realized; and no debt is to count more than once. The expenses of administration, except Surrogate fees, are not to be deducted from the value of the property to determine the aggregate value.

The “dutable value” is the value of the property after the debts, encumbrances or other allowances or exemptions authorized by the Act are deducted therefrom. The value is taken as of the date of the death of the deceased, and the deductions already mentioned, including reasonable funeral expenses, are subtracted.

The meaning of this sub-section, and of section 4, was much discussed in *Attorney-General v. Brown*, 5 O.L.R. 167. In that case the estate was nearly \$13,000; out of that sum some \$7,500 was given to the defendant by the testator as a *donatio mortis causa*, so far as the form of the transfer was concerned, but the transfer was really made in pursuance of a contract between the deceased and the defendant, the consideration being of a value substantially equivalent to the property transferred; and exceeding \$6,000. This reduced the aggregate value of the estate, and the dutiable value below \$10,000, and no duty was payable.

The definitions of “aggregate value” and “dutable value”

in the Ordinances of the North-West Territories are very similar to those in the Ontario Act. In British Columbia, "value" is defined as the fair market value after paying the expenses of administration and all just debts and liabilities. In Manitoba "value" means fair market value after payment of all debts, obligations and liabilities.

In Ontario the amount of duty payable is dependent upon the aggregate value. While 1 Edw. VII. ch. 8, sec. 3, was in force, "aggregate value" meant the value of the property before any debts or other allowances or exemptions were deducted therefrom. That statute was passed in consequence of the decision in *Ross v. The Queen* (1900), 32 O.R. 143, in which it was decided that debts should be deducted to determine the aggregate value, and that if after the duty was paid, debts were discovered which brought the aggregate below the statutory minimum, the amount so paid as succession duty in ignorance of the debts might be recovered back. The effect of 1 Edw. VII. ch. 8, sec. 3, was considered in *Attorney-General v. Lee* (1905), 9 O.L.R. 9, 10 O.L.R. 79. That case decided that upon the construction of the statute as it then stood, in estimating the aggregate value of the property of a deceased person within the meaning of the Succession Duty Act, R.S.O. ch. 24, as amended by 62 Vict. (2) ch. 9, and 1 Edw. VII. ch. 8, the value of the land of the deceased, where such land is encumbered or mortgaged, is to be taken, and not merely the value of the equity of redemption therein.

The clause now in force was enacted in 1905, and again authorizes the deduction of such debts and encumbrances as are not excluded by sub-sec. 4, clauses (a), (b), (c) and (d).

No duty is leviable on any estate the aggregate value of which does not exceed \$10,000. The term "aggregate value," for the purposes of the Act, has already been considered: See *Attorney-General v. Brown*, 5 O.L.R. 167.

No duty is leviable on property which goes to religious, charitable or educational purposes to be carried on by a corporation or person domiciled in Ontario.

In Manitoba, the limit is \$4,000; in British Columbia, \$5,000; and in the North-West Territories, \$5,000.

Nor is succession duty payable on property passing upon the death of the owner to or for the use of the father, mother, spouse, child, daughter-in-law, or son-in-law, of the deceased, where the aggregate value of the property passing to them does not exceed \$50,000. Two terms in section 3, sub-section 3, have been defined by the statute, viz.: "child" and "aggregate value." See *ante*.

Before the passing of 5 Edw. VII. ch. 6, the aggregate value passing to or for the use of the father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law, of the deceased owner upon his death without liability for duty was \$100,000. Before 1 Edw. VII. ch. 8, debts and encumbrances were to be deducted in order to determine the aggregate value: *Ross v. The Queen*, 32 O.R. 143, 1 O.L.R. 487. But since that enactment, and before 5 Edw. VII. ch. 6, the debts and encumbrances could not be deducted: *Attorney-General v. Lee*, 9 O.L.R. 9, 10 O.L.R. 79. The Act of 1905 again permitted debts and encumbrances to be deducted, but reduced the aggregate value of the property passing to the persons named, without duty, to \$50,000.

In British Columbia, Manitoba and the Territories, the amount passing without duty to the relatives named above is \$25,000.

Subject to the exceptions already mentioned, the following property is liable to succession duty on the death of the owner:—

(1) All property within Ontario, every interest therein, and any income therefrom, regardless of the domicile of the deceased owner. See *Attorney-General v. Newman*, 31 O.R. 540, 1 O.L.R. 511.

(2) All moveable or personal property locally situate out of the Province, and any interest therein, if the deceased owner was domiciled in Ontario.



(3) All gifts of property situate as aforesaid, and any interest in property, or income therefrom, made in contemplation of the death of the donor, or intended to take effect after his death.

A conveyance made more than a year before his death and while he was in comparatively good health, by a person who kept possession of the property conveyed, until his death, was not made in contemplation of death within the meaning of the Act, but as possession was retained it was liable to duty: *Re Roach* (1905), 10 O.L.R. 208.

With a view to render the designation of dutiable property more certain, but so as not to restrict the generality of the foregoing provisions as contained in section 4, sub-section 1, clauses (a) and (b), more specific directions are given in clauses (c), (d), (e), (f), (g) and (h). They may be summarized as follows:—

(c) *Donationes mortis causa* are dutiable. Gifts *inter vivos* are also dutiable unless made more than twelve months before the donor's death. They are dutiable no matter when made unless the immediate, exclusive enjoyment and possession have passed to the donee: *Attorney-General v. Brown*, 5 O.L.R. 167; *Re Roach*, 10 O.L.R. 208.

(d) Property which any person has caused to be transferred to himself jointly with any other person, including purchases and investments so taken by him, is also within the Act.

(e) Property passing upon any trust or settlement where the settlor reserves an interest therein terminable by reference to death, or reserves a power to re-settle the property, or to re-vest the property or some interest therein in himself, is also within the section.

(f) Any annuity, to the extent of the beneficial interest which passes on the death of the person who purchased or provided the annuity, is dutiable. Clauses (d), (e) and (f) only relate to the estates of persons who die since the 7th day of April, 1896.

(g) Property over which the deceased had a power of disposal is also liable.

(h) An estate in dower, or by the courtesy, must also pay duty.

The payment of duty under the Succession Duty Act is based upon administration, and duty is payable upon any property which can properly be administered only in Ontario. Money deposited in a bank on non-negotiable deposit receipts by a foreigner, can only be reduced into possession by his legal personal representative in Ontario, and succession duty is therefore payable thereon: *Attorney-General v. Scotten*, 1 O.L.R. 5.

The amount of the duty is set out in section 4, sub-sections (3), (4), (5), (6) and (7). It varies from 1 per cent. to 10 per cent., according to the aggregate amount of the estate, the nearness or remoteness of the relationship of the beneficiaries to the deceased, and the amount passing to any one person. A gift of \$200 or under to any one person is not dutiable.

Moveable or personal property locally situate out of the province, is, as we have already seen, liable to duty when the owner died domiciled in Ontario. But, by sub-section 9 of section 4, that is extended to include any portion of the estate brought into Ontario for administration or distribution. A reduction of the duty is made by the amount of duty paid on such property elsewhere before it is brought into this province, and a like allowance is made on the moveable and personal property. These allowances are only made when the country, state, province or possession where the property is situate makes a similar allowance in like circumstances for succession duty paid in Ontario on property situated here. This right is ascertained by Orders-in-Council, which are subject to revocation when the foreign law is altered. The executor or administrator who distributes any part of an estate without bringing it into Ontario, for the purpose of escaping duty, is personally liable for the duty. Assets

situated without the province may be paid over to persons domiciled out of the province without liability.

A *bona fide* transfer of property for a consideration of value substantially equivalent to the property transferred is not liable for duty: Sec. 4, sub-sec. 11. *Attorney-General v. Brown*, 5 O. L.R. 167.

To prevent the transfer of stocks or shares in Ontario by foreign executors or administrators, every corporation allowing such transfer before payment of the duty or the filing of a bond for it, is made liable for the amount of the duty. Section 4a.

Section 5 makes a statutory provision for disclosure by the executors or administrators, when they apply for probate or letters of administration, of the property of the deceased, by a full itemized inventory thereof with its market value. They must also shew the persons to whom the same will pass, and the relationship of each to the deceased. In every case in which the property of the deceased person is liable, or may become liable, to succession duty, the personal representatives must give a bond for the payment of any duty to which the Crown may become entitled. The bond must be with two sureties, and is for 10 per cent. of the sworn value of the estate.

If there is no executor or administrator who can be made accountable for the duty, then the beneficiaries become liable, and also every trustee, guardian, committee or other person who has the control or management of any of the property.

The Surrogate Registrar of any county may at the instance of the Provincial Treasurer, his solicitor or agent, direct the sheriff to make a valuation and appraisalment of the property of an estate, whether included in the inventory filed by the personal representative or not. Section 6.

The sheriff proceeds, upon written notice to the personal representatives, and to such other persons as the Surrogate Registrar may direct, to make his report in writing to the Surrogate

Registrar. The fees of the sheriff are fixed by the statute. Section 7.

In the event of disagreement, provision is made by section 8 for determining the amount of the debts, encumbrances and other allowances, and also for fixing the cash value at the date of death, of all estates, interests, annuities, life estates and terms of years growing out of the estate, and the duty thereon. The Surrogate Registrar is empowered to fix and settle all these cash values. He is to notify all parties interested. He may appoint a guardian of infants for the purposes of the Act, if there is no other guardian. Future, contingent and limited estates, incomes or interests are to be determined on a four per cent. basis, by the Inspector of Insurance, and certified to the Surrogate Registrar.

An appeal is given by section 9 from the report of the sheriff or the assessment of the Surrogate Registrar, within thirty days. The appeal is to the Surrogate Judge. If the value of the property, debts or allowances and exemptions exceeds \$10,000, a further appeal is given to a Judge of the High Court, and thence to the Court of Appeal. The Provincial Treasurer has the right of appeal under this section: *Re Roach*, 10 O.L.R. 208.

By the provisions of section 11, the duty on any future or contingent estate, income or interest may be paid at any one of three times:—

1. Within eighteen months of the decease of the former owner. The duty is then computed on the basis of the dutiable value at the time of the death.

2. By consent in writing of the Provincial Treasurer it may be paid after the lapse of the eighteen months and before the estate, income or interest comes into possession. The duty is then computed on a value not less than the value of the estate, income or interest as of the date when the payment is made. No deduction is to be made on account of any payment of duty on any prior estate, income or interest.

3. If not sooner paid, the duty must be paid when such fu-



ture or contingent estate, income or interest comes into possession. The duty is computed on the value at the time of coming into possession, and no deduction is to be made for duty paid on any prior estate, income or interest.

The computations of value are in all cases to be made under section 8. See *Attorney-General v. Cameron*, 27 O.R. 380; 28 O.R. 571; *Attorney-General v. Toronto General Trusts Corporation*, 5 O.L.R. 216.

In *Attorney-General v. Stuart*, 2 O.L.R. 403, a testator died in 1901, leaving lands in Ontario. He gave a life estate to his sister, and a power of appointment by will. The sister died shortly after the death of the original testator, without having proved his will, of which she was executrix. She had made her will in 1873, and gave all her estate to the defendant, who took out probate in England, and applied for an ancillary grant in Ontario. It was decided that the lands in Ontario were subject to two duties as having devolved under two wills.

The duty is payable by the executors or administrators, and each legacy, if duty is payable in respect to it, must bear its share of the burden. It should be deducted before payment over to the legatee. The duty cannot be paid out of the residue only: *Kennedy v. Protestant Orphan's Home*, 25 O.R. 235; *Manning v. Robinson*, 29 O.R. 484; *Re Holland*, 3 O.L.R. 406.

If the payment is made by the personal representative before the estate, income or interest comes into possession, the beneficiary, when possession arrives, must repay the duty with interest. Sec. 11, sub-sec. 2.

Executors and other trustees are given power to commute the duty on any future estates, income or interest. Sub-sec. 4.

The duty on incomes for life is payable in four instalments.

Duty not paid within the time limited becomes a charge on the property on which it is payable. A certificate of the Provincial Treasurer, in the absence of fraud, discharges the property from the lien.

The time for payment of the duty may be extended either by the Lieutenant-Governor-in-Council, when payment within the statutory time is unduly onerous; or by the Surrogate Judge when for some cause over which the person liable has no control, payment within the time fixed by law is impossible. Section 12, sub-section 2, section 13.

Executors and administrators are empowered to sell property to enable them to pay the duty. They are required to deduct the duty before delivering over the property, and to make immediate payment to the Provincial Treasurer.

When duty has been paid, and, owing to debts afterwards discovered the legacy or property on which it has been paid has been refunded, the duty must be repaid to the person entitled, either by the personal representative or the Provincial Treasurer. Section 7; *Ross v. The Queen*, 1 O.L.R. 487.

Sections 18, 19 and 19*a* make provision for enforcing payment of succession duty. The Surrogate Judge may summarily inquire into the non-payment of duty, and may proceed to enforce payment with costs on the County Court scale. The duty may also be recovered by suit. Various special provisions regarding the conduct of such suits are set out in section 19*a*.

The Judges and Registrars of the several Surrogate Courts, and the solicitors practising therein, are entitled to take for the performance of duties and services under the Succession Duty Act similar fees to those payable to them under the Surrogate Courts Act and the Surrogate Court Rules. The fees payable under this Act are to be taken into account under section 83 of the Surrogate Courts Act, in reference to the commutation of the fees of Surrogate Judges.

The Lieutenant-Governor-in-Council is empowered to make regulations for carrying the Act into effect. The regulations made and the forms prescribed thereunder, are given with the Act.

# THE SURROGATE COURTS, ONTARIO.

(For the authority under which the following rules are made see sections 86 and 88 of the Surrogate Courts Act, R.S.O. 1897, ch. 59.)

## RULES.

The Judges of the Supreme Court of Judicature for Ontario do, in pursuance of the powers conferred by the Revised Statutes of Ontario 1887, ch. 50, sec. 78, and 53 Vict. ch. 17, sec. 19, order and direct that the rules, orders and directions hereinafter set forth shall henceforth be the General Rules and Orders in non-contentious business and in contentious business, respectively.

For regulating the procedure and practice of the Surrogate Courts.

For regulating the duties of the Registrars of the several Surrogate Courts and the duties of the Surrogate Clerk; and

For fixing the fees to be taken by the Registrars and other officers of the said Courts, and by solicitors practising therein; and also

In relation to the provisions of the Surrogate Courts Act, and the Devolution of Estates Act.

### *Former Rules Repealed from 1st April, 1892.*

All rules and orders heretofore passed and not included in these rules are rescinded, and these rules shall take effect on and after the first day of April, 1892. All practice inconsistent therewith is superseded. As to matters not provided for in these rules, the practice is, as far as may be, to be regulated by analogy thereto. (See Rule 3, Con. Rules of Practice.) In any matter not so provided for in which the practice cannot be regulated by such analogy, such practice shall be regulated by analogy to the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario.

*Judge May Sit at Any Time.*

Subject to Rules of Court, the Judge of the Surrogate Court shall have power to sit and act at any time for the transaction of any part of the business of such Court, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during term. (See Rule 1255, Con. Rules of Practice.)

PROCEDURE.

*Non-contentious Business.*

1. Non-contentious business shall include all common form business as defined by the Surrogate Courts Act, and the warning of caveats.

*Solicitors.*

2. Application for probate or administration may be made by a solicitor or in person.

*Probate After Seven Days.*

3. No probate, or letters of administration with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the Judge.

*Administration After Fourteen Days.*

4. No administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the Judge.

*Petition.*

5. Every application to a Surrogate Court for grant of probate or administration must be by petition prepared, signed and presented by the applicant or his solicitor.

Such petition shall in every case shew the value of the whole property of the deceased, and also the separate value of the personal and real estate, and full particulars and an appraisalment of all said property shall be exhibited with such application and shall be verified upon oath.



*Search for Will.*

6. Upon every application for grant of administration, it must be shewn that search for a will or testamentary paper has been made in all places where the deceased usually kept his papers, and in his depositories. The affidavit should be made by the applicant, but the proof may, with the Judge's consent, be made otherwise. It must also be shewn that search has been made in the office of the Registrar of the proper Surrogate Court, and the certificate of such Registrar shall be sufficient proof of such search having been made.

*Bond with Petition.*

7. Unless the Judge shall otherwise order, the Registrar shall with the application for grant of administration submit the bond proposed to be given, with the necessary affidavits of justification and of execution, and in every case such bond shall be without material erasure or interlineation.

*Filing Affidavits.*

8. The necessary affidavits to lead grant, and the usual oath of executors and administrators, may be taken at the time the application for grant is signed, or afterwards at any time before the application is submitted to the Judge for his order and direction. The proofs to lead grant may be embodied in one affidavit.

*Variance Between Petition and Proof.*

9. If there should appear to be any material variance between the application and affidavits made in support thereof, the Judge may direct such application to be amended according to the fact, and a new notice on such amended application to be sent to the Surrogate Clerk.

*Proof of Will.*

10. The due execution of the will or codicil shall be proved by one of the witnesses, or the absence of the witnesses accounted for; in which last case such will or codicil must be established by other proof, to the satisfaction of the Judge.

*Prior Interests Cleared.*

11. The oath of administrators, and of administrators with the will annexed, is to be so worded as to clear off all persons having a prior right to the grant. In these cases the grant should shew on the face of it how the prior interests have been cleared off.

*Oath in Writing.*

12. The usual oath of administration is to be reduced to writing, and to be subscribed and sworn to by the executors or administrators as an affidavit.

*Special Grant.*

13. Under the statute the several Surrogate Courts have power to appoint an administrator other than the person who, prior to the Act, would have been entitled to the grant. (Sec. 56.) (R.S.O. 1897, ch. 59, sec. 59.) Whenever the Judge sees fit to exercise such power, the fact should be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

*Limited Administrations.*

14. Where limited administrations are applied for, it must be made to appear that every person entitled in distribution to the property has consented, or renounced, or has been cited and failed to appear, except when the Judge sees fit otherwise specially to direct.

15. No person entitled to a grant of administration to the property of the deceased generally shall be permitted to take a limited grant, except grants for personal estate only under section 58 [now 61] of the Surrogate Courts Act.

*Recitals in Special Administration.*

16. In administration of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

*Grants to Guardians.*

17. Grants of administration may be made to the guardians of infants and minors, for the use and benefit of such infants and minors during their minority; and elections by minors of their next of kin, or next friend, as the case may be, to such guardianship, shall be required when the infant is fourteen years of age and over. (See R.S.O. 1887, ch. 137, secs. 4, 10, 18.) (R. S.O. 1897, ch. 168.)

*Marking Will.*

18. Every will or copy of a will, to which an executor or administrator with the will annexed is sworn, should be marked by such executor or administrator and by the person before whom he is sworn.

*Passing Accounts.*

19. Executors and administrators shall within a period of eighteen months after grant made, and sooner if the Judge shall so direct, exhibit under oath a true and perfect inventory of the property of the testator or intestate (as the case may be), and render a just and full account of their executorship or administration. The Judge shall upon application made to him for that purpose have power to extend the said period of eighteen months. If the executor, or administrator with the will annexed, is the sole legatee or devisee of the property devolving, the Judge may direct that he shall be relieved from the operation of this rule providing there are no creditors of the estate.

*Note.*—See section 73 of the Surrogate Courts Act, which repeals this rule in part, is as follows:—

“(3) Sub-section 2 of section 73 of the said Act is repealed and the following substituted therefor:—

“(2) The oath to be taken by executors, administrators and guardians, and the bonds or other security to be given by administrators and guardians and letters probate, letters

of administration and letters of guardianship hereafter issued shall require the executor, administrator and guardian to render a just and full account of his executorship, administration or guardianship only when thereunto lawfully required." 2 Edw. VII., ch. 12, sec. 11(3).

19(a) The general rules which govern in the Master's office of the Supreme Court of Judicature under a judgment, or order of reference, and the rules of practice and procedure thereof for the time being, so far as the same can be made to apply, shall be adopted in the case of the auditing an executor's and administrator's account by the Judge, substituting the word "Judge" for the word "Master" and also for the word "Examiner" wherever it occurs in any such rule. (See Con. Rules of Practice, 57 *et seq.* to Rule No. 59 inclusive.)

*Deposit of Will.*

20. A will deposited for safe keeping in the office of the Registrar of the Surrogate Court shall not be removed therefrom, except by the testator in person, unless the order of the Judge permitting such removal shall have been first obtained.

*Order Made Instead of Citation.*

21. In all cases in which it has been heretofore necessary to issue a citation to accept or refuse probate of a will, or to accept or refuse letters of administration, or to issue a subpoena to bring in a testamentary paper, and in all similar cases, the Judge's order shall be made, and shall have the like effect as such citation or subpoena formerly had. (See Rules 1045 and 1098 Con. Rules of Practice and see new form 30.)

*Caveat, Form of.*

22. The party entering a caveat must declare therein the nature of his interest in the property of the deceased, and state generally the grounds upon which he enters such caveat, and the same shall be signed by the party, or by his solicitor on his be-



half, and the proper place mentioned as the address of the party or of his solicitor entering the caveat; and no caveat shall have any force or effect, unless the requirements of this rule be in substance complied with.

*Caveat, Duration of.*

23. A caveat shall remain in force for the space of three months only and then expire and be of no effect; but caveats may, subject to the Judge's order, be renewed from time to time.

*Clearing Off Caveat.*

24. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service, and an affidavit of search for appearance and of non-appearance, must be filed.

*Caveat, Grant on Same Day.*

25. No caveat shall affect any grant made on the day on which the caveat is entered, unless notice of such caveat has been received prior to the grant passing the seal.

*Caveat, Where Warned.*

26. A caveat shall be warned at the place mentioned in it as the address of the person who entered it or of his solicitor.

*Warning, How Served.*

27. It shall be sufficient for the warning of a caveat, that the Registrar of the Court in which application for grant is made send by public post, prepaid and registered, a warning signed by himself bearing the seal of the Court, and directed to the person who entered it or to his solicitor, if signed by a solicitor, at the address mentioned in it.

*Appearance, When and How Entered.*

28. Any person intending to oppose a grant of probate or administration, for which application has been made to a Sur-

rogate Court, must within ten days after service appear, either personally or by a solicitor, and enter an appearance in such Court, in which appearance the address of the party, or of his solicitor, shall be given. This rule is to apply whether the person intending to oppose the grant has or has not been previously warned to a caveat, or served with a citation. (*See rules in contentious business, post.*)

*Appearance, Stay of Proceedings.*

29. When a party intending to oppose a grant, has filed an appearance with the Registrar, no further steps in respect to such grant shall be taken, except under the special direction of the Judge. (*See rules in contentious business, post.*)

*Citation by Publication.*

30. Citations against all persons in general and other instruments heretofore required to be served by affixing them in some public place, are in future to be served by the insertion of the same as advertisements in such newspapers, local, British or foreign, as the Judge may from time to time direct. Such citations can only be allowed to issue in cases where there is an affidavit to lead them and a Judge's order. (*See Rule 21, ante.*)

*Citation Under Section 41.*

31. Citations under the 38th (R.S.O. 1897, ch. 59, sec. 41) section of the Act may be served by inserting the same as advertisements in such one of the Toronto morning papers, or such other papers, local, British, or foreign, as the Judge of the Court may, by special order, direct.

*Bond, Form of.*

32. The bond to be given upon any grant of administration shall be according to the forms subjoined or in a form as near thereto as the circumstances of the case admit. (*See section 55 (R.S.O. 1897, ch. 59, sec. 58) of the Surrogate Courts Act, and 53 Vict. ch. 17, sec. 14.*)

*Sureties to Justify.*

33. The sureties in such bond are required in all cases to justify. (See section 64 of the Surrogate Courts Act (R.S.O. 1897, ch. 59, secs. 69, 70).) And such justification shall be to an amount or amounts which in the aggregate shall equal the amount of the penalty of the bond. No Surrogate Clerk or Registrar shall become surety to any administration bond.

*One Surety, When.*

34. In ordinary cases where property is *bona fide* under the value of two hundred dollars, one surety only may be taken to the administration bond.

*Two Sureties Required.*

35. In all other cases, unless the Judge shall otherwise direct, two sureties are always to be required to the administration bond, and the bond is to be given in double the amount of the fund to be dealt with under the administration.

*Renunciation After Application.*

36. Whenever any renunciation is filed subsequent to notice of application to the Surrogate Clerk, or any alteration is subsequently made in the grant, notice of such renunciation or alteration is to be immediately forwarded by the Registrar of the Court to the Surrogate Clerk.

*Affidavits, Form of.*

37. Every affidavit shall be drawn up in the first person, stating the name of the deponent at the commencement in full, and his description and true place of abode, and shall be signed by him. (See Rule 605, Con. Rules of Practice.)

*Joint Affidavits.*

38. In every affidavit made by two or more deponents, the names of the several persons making it are to be written in the jurat. Except that if the affidavit of all the deponents is taken

at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. (See Rule 606, Con. Rules of Practice.)

*Affidavit, by Whom Filed.*

39. There shall be appended to or indorsed upon every affidavit, a note signed by the solicitor or the party in person, shewing on whose behalf it is filed. (See Rule 608, Con. Rules of Practice.)

*Affidavit by Blind or Illiterate Deponent.*

40. Where an affidavit is made by any person who is blind, or who from his or her signature, or otherwise, appears to be illiterate, the Registrar or other officer before whom such affidavit is made, is to state in the jurat that the affidavit was read in his presence to the deponent, and that such deponent seemed perfectly to understand the same; and also that the said deponent made his or her mark, or wrote his or her signature, in the presence of the Registrar or other officer, before whom the same was taken. No such affidavit shall be used in evidence in the absence of this statement, unless the Court or a Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent. (See latter clause of Rule 612, Con. Rules of Practice.)

*Affidavit, Alterations in.*

41. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall, without the leave of the Judge, be read or made use of in any matter pending in any Surrogate Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit; nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it. (See Con. Jud. Rule 611.)



*Affidavit, Before Whom Sworn.*

42. No affidavit which has been sworn before the party on whose behalf the same it offered, or before his solicitor, or before the clerk, or partner of such solicitor, is to be admitted, unless the Judge shall otherwise direct.

## REGISTRARS.

*Office Hours.*

43. Every Registrar of a Surrogate Court shall keep his office open on such days and during such hours as the office of the Clerk of the County Court is required to be kept open, and every Registrar shall keep his office at the county town.

*Registrars' Books.*

44. Every Registrar of a Surrogate Court shall keep books as nearly as may be in the manner shewn in the forms. He shall keep such books duly indexed from time to time, and shall also keep an index of the names of testators or intestates, and of executors and administrators, which shall be arranged alphabetically. The Non-contentious Business Book shall contain columns for the entry of the sworn value of the personal property and of the real property.

*Filing Papers.*

45. Every Registrar shall duly endorse and file all papers received by him, and enter a note thereof, and of every proceeding in the Court, in the books to be kept.

*Small Estates, Preparing Papers.*

46. When it is so desired by any applicant for grant of probate or administration where the value of the property devolving does not exceed \$400, the Registrar of the Court in which application is to be made may prepare the application and all other forms necessary in non-contentious business, without the intervention of a solicitor; but in no other case shall he prepare the papers for grant. And in no other case shall any person

other than the applicant or his solicitor, either directly or indirectly, prepare the application or other papers to be used in any application or matter in the Surrogate Court, nor shall any person other than a solicitor be permitted to practice in the Surrogate Court. (See sections 67 and 15 of the Surrogate Courts Act.) R.S.O. 1897, sections 74 and 16.

*Entry of Application by.*

47. The Registrar shall properly number and endorse the date of receipt of all applications for the grant of probate or administration received by him in the order in which they are received, and an entry thereof shall be made in the book to be kept for that purpose, with a number prefixed to correspond with the number on the application.

*Notice to Surrogate Clerk.*

48. Notices of applications to be transmitted to "The Surrogate Clerk" under the 41st (R.S.O. 1897, ch. 59, sec. 44) section of the Act, are to contain the Christian and surname, residence and addition of the deceased, the time of his death, Christian and surname, residence and addition of applicant, nature of application, and Court in which made. [Forms are subjoined, to be varied according to the circumstances.]

*Transmission of, by Post.*

49. All papers and communications from Registrars to the Surrogate Clerk shall be transmitted through the post office, the letter or packet to be registered and prepaid.

*Certificate of Surrogate Clerk.*

50. Every Registrar, upon receipt of a certificate from the Surrogate Clerk touching an application made to the Court of which he is Registrar shall forthwith enter a note thereof in the book to be kept for that purpose; and shall, as soon as may be thereafter, lay such application, and all papers in relation to the same, before the Judge, for his order and direction thereupon.

*Order Books.*

51. Every order made by the Judge upon or in reference to any application, shall be noted by the Registrar in the books to be kept for that purpose.

*Register Book—Grants and Revocations.*

52. When the Judge makes an order for the grant of probate or administration, the Registrar shall record such grant in the "Register Book," and in case of the grant of probate or letters of administration with the will annexed, an exact copy of the will, and codicil, if any, to which such probate or administration relates, shall be underwritten. If a grant be afterwards revoked, a note of such revocation shall be entered across the record of grant in the Register Book.

*Bonds to be Recorded.*

53. The administration bond and affidavits of justification and of execution shall be recorded by the Registrar in the proper registry book. (See R.S.O., ch. 137, sec. 12, last clause.) (R.S.O. 1897, ch. 168, sec. 13.)

*Grants to be Signed and Sealed by.*

54. All probates and letters of administration shall be signed by the Registrar, and sealed with the seal of the Court from which they are issued, and the copy of the will, and codicil, if any, annexed to a probate or to letters of administration, shall be authenticated by the signature of the Registrar.

*List of Grants to be Sent to Surrogate Clerk.*

55. The list of grants of probates and administration, and of revocation thereof, required under the 14th (R.S.O. 1897, ch. 59, sec. 15) section of the Act, to be sent by Registrars to the Surrogate Clerk, are to contain in each case the Christian and surname, residence, and addition of the deceased, the time of his death, date of the grant, name, residence, and addition of executor or administrator, nature of grant, and in what Surrogate Court.

*Entry of Caveats.*

56. Every Registrar of a Surrogate Court shall number, endorse and enter all caveats lodged with him, in the same manner as provided in respect to applications for grants; and notice thereof (*see form, post*) shall be sent to the Surrogate Clerk by the next post after such caveat has been lodged.

APPEALS TO THE COURT OF APPEAL.

57. Appeals under the 33rd (R.S.O. 1897, ch. 59, sec. 36) section of the Act shall be subject to the following regulations:—

In case any person desires to appeal from any order, sentence, judgment or decree of a Surrogate Court, or from the determination of the Judge thereof on any point of law—

(1) He (or in case of his absence, some one on his behalf) shall, with two sufficient sureties, execute a bond to the respondent in the sum of two hundred dollars, to the effect that the appellant will effectually prosecute his appeal, and pay such costs, charges and expenses as shall be awarded in case the order, sentence, judgment, determination or decree (as the case may be) shall be affirmed or in part affirmed.

(2) The sureties to such bond shall make affidavit as to their sufficiency.

(3) An affidavit of the execution of the said bond shall be made by the subscribing witnesses thereto.

(4) An affidavit shall be made by the appellant, his solicitor or agent, that the property to be affected by such order (or decree or as the case may be) is over the value of two hundred dollars.

(5) The said bond and affidavits shall be filed with the Registrar of the Surrogate Court.

(6) A notice of such appeal shall be served by the appellant on the opposite party, his solicitor or agent.

(7) If such bonds and affidavits be made and filed, and such notice be served within fifteen days next after the order, sentence,



judgment, decree or determination appealed against, the appeal shall be held by such Surrogate Court to be duly lodged.

(8) In lieu of giving the above-mentioned bond, the appellant shall be at liberty to pay into the proper Surrogate Court, as security, a sum of money not less than \$100.

*Stay on Entry of Appeal.*

58. When an appeal is so lodged the Judge of the Surrogate Court shall, upon the application of the appellant, order all proceedings in the matter to be stayed.

*Papers to be Forwarded on Appeal.*

59. Upon a certificate from the Registrar of the Court of Appeal, that the appeal has been filed in his office, the Judge of the Surrogate Court shall, upon the application of the appellant, order the Registrar of the Court forthwith to transmit (at the expense of the appellant) to the Registrar of the Court of Appeal the documents, instruments, affidavits and papers in the matter appealed, deposited or filed in such Surrogate Court, together with the judgments or decisions of the Judge.

REMOVAL OF CAUSES.

60. When a cause or proceeding is removed into the High Court, under the thirty-first section of the Act (R.S.O. 1897, ch. 59, sec. 34), the Judge of the Surrogate Court shall, upon the application of the party who has obtained the order for removal, in like manner as mentioned in Rule 59, direct the papers in the matter to be transmitted to the Surrogate Clerk, to be by him transmitted to the proper officer of the High Court.

THE SURROGATE CLERK.

*Office of.*

61. The Surrogate Clerk shall keep an office at such place in the City of Toronto as the Judges of the Supreme Court of Judicature for Ontario may direct, and such office shall be kept open

daily, except on the appointed holidays of the Court, for and during such hours as the said Judges shall prescribe.

*Books of.*

62. The Surrogate Clerk shall keep books as nearly as may be in the manner shewn in the forms hereinafter set forth, which books he shall keep duly indexed from time to time.

*Entries by.*

63. The Surrogate Clerk shall properly number and endorse the date and receipt of all notices of application to any Surrogate Court for the grant of probate or administration received by him, in the order in which they are received; and an entry thereof shall be made in the book to be kept for that purpose, with a number prefixed to correspond with the number on the notice of application; and all caveats and copies of caveats lodged with and received by the Surrogate Clerk, shall in like manner be numbered, endorsed, and entry thereof be made in the book to be kept for that purpose.

*Notice of Application for Grant—How Dealt With.*

64. The Surrogate Clerk, upon receiving a notice of application for probate or administration, if seven days in cases of testacy and fourteen days in cases of intestacy, have elapsed after the death of the deceased (as shewn in the notice), shall forthwith make the necessary search and examination in the books required to be kept by him, and amongst the original papers on file in his office; and on the next office day after the receipt of such notice shall mail a certificate as to such search according to the form numbered 9, or as near thereto as the circumstances of the case will admit. If at the time of receiving a notice of application the periods aforesaid shall not have expired, the Surrogate Court shall not make such search and examination, nor shall such certificate be sent until the eighth day after the death of the testator, and the fifteenth day after the death of the intestate, ac-

ording to the time of the decease, as shewn in the notice of application for probate or administration.

*Grants and Revocations to be Entered.*

65. The Surrogate Clerk shall extract from the lists furnished to him under the 14th (R.S.O. 1897, ch. 59, sec. 11) section of the Act the particulars of each grant, and shall enter a note of the same, placing it in its alphabetical order under the first letter of the surname of the testator or intestate, in the book to be kept by him for that purpose, and shall also note in such book every revocation of a probate or administration notified to him; and all lists, copies of will, returns of revocations, and papers received by the Surrogate Clerk, shall be filed and endorsed in like manner as is provided in respect to notices of applications for grants.

*Names Idem Sonans.*

66. If it shall appear from the entries required to be kept by the Surrogate Clerk, or from inspection of the original papers on file in his office, that the name of the deceased person, as given in any application for probate or administration, although not identical in the mode of spelling, yet is, or appears to be, *idem sonans* with the name of the testator or intestate, as given in any other application or in any lists of grants on file, or if in such examination or inspection it shall for any other cause appear doubtful whether another application or an actual grant has not been made in the property of the same deceased person, the Surrogate Clerk shall certify the special matter as disclosed in such search and inspection by him.

*Communications, How Sent.*

67. All communications from the Surrogate Clerk to Registrars of Surrogate Courts shall be by registered letter.

*Officer of High Court.*

68. The Surrogate Clerk as an officer of the High Court shall perform such other duties as shall be prescribed by the rules or by the Judges of said Court.

FEES.

*Tables to Govern.*

69. Registrars and other officers of Surrogate Courts shall be entitled to take and receive to their own use the fees set forth in the tables of fees subjoined for the performance of duties and services under the Act.

*Fees Payable to Registrar for Crown and Judge.*

70. The fees payable to the Crown in stamps and to the Judge and Registrar on business and proceedings in the Surrogate Courts, as well as postage when necessary, shall be paid to the Registrars, in the first instance, by the party on whose behalf such proceedings are to be had, on or before such proceeding. In case the Judge's fees are commuted the stamps in lieu thereof shall be produced by the Registrar to the Judge for cancellation. (*See the Surrogate Courts Act, sec. 73, sub-sec. 2*) ; *R.S.O. 1897, sec. 83.*

*Fees of Solicitors and Counsel.*

71. Solicitors and counsel practising in said Courts shall be entitled to take for the performance of business and services under the Act, the fees set forth in the subjoined table.

*Taxation of Costs.*

72. The Registrar shall tax costs, subject to appeal to the Judge. (*See R.S.O. 1887, ch. 47, sec. 8; R.S.O. 1897, ch. 55, sec. 10.*)

FORMS.

73. The subjoined forms are to be adopted and followed in the several Surrogate Courts as nearly as the circumstances of each case will allow.

In case the application be limited to administration of personal estate the forms may be modified accordingly.

*Interpretation Clause of Act.*

74. In the construction of these rules the provisions contained in the second section of the Act shall apply.



## CONTENTIOUS BUSINESS.

*Definition.*

1. A proceeding shall be adjudged contentious when an appearance has been entered by any person in opposition of the party proceeding, or when a citation or Judge's order has been obtained against a party supposed to be interested in a proceeding, or when an application for grant is made on motion and the right to such grant is opposed, or when application is made to revoke a grant, or when there is contention as to the right to obtain probate or administration, and before contest terminated.

*Appearance.*

2. The practice as to appearance shall, in so far as shall be practicable, be that prescribed by the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario.

*Practice of High Court.*

3. In contentious proceedings the practice and procedure shall, as nearly as may be, correspond with the practice and procedure in the High Court after appearance entered.

*Summons to Proceed.*

4. If the party who has entered an appearance shall not use due diligence in the prosecuting of the proceedings, the applicant may obtain a summons calling upon him to shew cause why he should not file a plea within a limited time, or in default thereof why grant should not be made.

*Intervention of Person Interested.*

5. Any person not named in the petition or in the order of the Judge may intervene and appear thereto on filing an affidavit shewing that he is interested in the estate of the deceased.

*Proof in Solemn Form.*

6. The party opposing a will may, with his statement of defence, give notice to the party setting up the same that he merely

insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to liability in respect of costs in the discretion of the Judge.

*Default of Defence.*

7. If any defendant make a default in filing and delivering a defence, the action may proceed notwithstanding such default; or the plaintiff may obtain a summons calling upon the defendant to shew cause why grant should not be made without further proceedings.

*Judge's Direction.*

8. In any case not provided for and in which there is no analogous practice in the High Court, the party desiring to pursue a claim, remedy or right, may apply to the Judge for direction and order as to the course to be pursued.

*Examples of Forms.*

9. The forms subjoined to these rules (*I.e.*, under the heading—"Contentious Business—Forms") and numbered 1 to 6 respectively, are given as examples of statements of claim and of defence respectively.

## NON-CONTENTIOUS BUSINESS.

## FORMS.

1. *Application for Probate in Common Form by a Sole Executor.*

Unto the Surrogate Court of the County (or United Counties) of

The petition of A.B., of the                      of                      , in the County of                      ,                      Esq.

Humbly sheweth,

That C.D., late of the                      of                      , in the County of                      , *surgeon*, deceased, died on or about the                      day of                      , A.D. 19                      , at                      , in, etc., and that the said deceased at the time of *his* death, had *his* fixed place of abode at                      , in the said County of                      , [*“or had no fixed place of abode in Ontario (or “resided out of Ontario”)*”] *“but had at such time property in the said County of                      .”*] That the said deceased in his lifetime duly made his last will and testament, bearing date the                      day of                      , 19                      , [and codicil (*or* codicils) bearing date the                      day of                      , A. D. 19                      .] That your petitioner is the executor named in the said will (*or* codicil). That the value of the whole property of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which a probate of the said will (and codicil) is to be granted, is under                      dollars. That the value of the personal estate and effects is under                      dollars, and of the real estate                      dollars, and that full particulars and an appraisement of all said property are exhibited herewith and verified upon oath.

Wherefore your petitioner prays that probate of the said will (and codicil) of the said deceased may be granted to *him* by this Honourable Court.

Dated the                      day of                      , A.D. 19                      .

A. B.

Or if signed by solicitor of applicant,

A. B.

By *his* solicitor, E.F.

2. *Application for Grant of Administration with the Will Annexed in Common Form, Where no Executors Appointed.*

Unto the Surrogate Court of the County (or United Counties) of \_\_\_\_\_

The petition of A.B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, Esq.

Humbly sheweth,

That C.D., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, *spinster*, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, at \_\_\_\_\_, in, etc., and that the said deceased at the time of *her* death, had *her* fixed place of abode at \_\_\_\_\_, in the said County of \_\_\_\_\_, [or "had no fixed place of abode in Ontario" (or "resided out of Ontario") "but had at such time property in the said County of \_\_\_\_\_,"] that the said deceased in *her* lifetime duly made *her* last will and testament, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, [and codicil (or codicils) bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_.]

That no executor is named in the said will (or codicil). That your petitioner is the residuary legatee (or as the case may be) named in the said will (or codicil). That the value of the whole property of the said deceased, which *she* in any way died possessed of, or entitled to, and for and in respect to which a probate of the said will (and codicil) is to be granted, is under \_\_\_\_\_ dollars. That the value of the personal estate and effects is under \_\_\_\_\_ dollars, and of the real estate is under \_\_\_\_\_ dollars, and that full particulars and an appraisement of all said property are exhibited herewith and verified upon oath.

Wherefore your petitioner prays that administration with the said will (and codicil) annexed, of the property of the said





That the value of the whole property devolving under the said will (and codicil) is under                  dollars, and that the value of the personal estate and effects of the said deceased, which *he* in any way died possessed of, or entitled to, is under                  dollars, and of the real estate is under                  dollars, and that full particulars and an appraisalment of all said property are exhibited herewith and verified upon oath.

Wherefore your petitioner prays that administration with the said will (and codicil) of the said deceased annexed, may be granted to *him* by this Honourable Court.

Dated the                  day of                  , A.D. 19                  .

A. B.

Or if signed by solicitor of applicant,

A. B.

By *his* solicitor, G.H.

#### 4. *Application for Grant of Administration.*

Unto the Surrogate Court of the County (*or* United Counties) of

The petition of A.B., of the                  of                  , in the County of                  , *spinster*.

Humbly sheweth,

That C.D., late of the                  of                  , in the County of                  , *merchant*, deceased, died on or about the                  day of                  , A.D.                  , at                  , in, etc., and that the said deceased at the time of *his* death, had *his* fixed place of abode at                  , in the said County of                  , [*or* “had no fixed place of abode in Ontario,” (*or* “resided out of Ontario”) “but had at such time property in the said County of                  .”]

That the said deceased died a bachelor, without parent, brother, or sister, uncle, or aunt, nephew, or niece (*to be varied according to the circumstances of the case*), and without having left any will, codicil, or testamentary paper whatever, and that your peti-

tioner is the lawful cousin-german and next of kin of the said deceased (*to be varied according to the circumstances of the case*).

That the value of the whole property of the said deceased, which *he* in any way died possessed of or entitled to, is under                      dollars. That the value of the personal estate and effects is under                      dollars, and of the real estate is under                      dollars, and that full particulars and an appraisalment of all said property are exhibited herewith and verified upon oath. Wherefore your petitioner prays that administration of the property (*or of the personal estate and effects, as the case may be*) of the said deceased may be granted and committed to *her* by this Honourable Court.

Dated the                      day of                      , A.D. 19                      .

A. B.

Or if signed by solicitor of applicant,

A. B.

By *his* solicitor, E.F.

5. *Notice to be Transmitted by Registrar of a Surrogate Court to the Surrogate Clerk of Application made to such Court for a Grant of Probate to Executor.*

In the Surrogate Court of the County of  
To the Surrogate Clerk:

Take notice, that application has been made to the Surrogate Court of the County of                      , for a grant of probate of the will bearing date the                      day of                      , A.D.                      , [and codicil (*or* codicils) bearing date the                      day of                      , A.D.                      ,] of                      , late of                      , in the County of                      , deceased, *surgeon*, who died on or about the day of                      , A.D.                      , having at the time of *his* death, a fixed place of abode at                      , in the said County of                      , [or “no fixed place of abode in Ontario,” (*or* “resided out of

Ontario,") "but having at such *time* property in the said County of \_\_\_\_\_ ] by A.B., of \_\_\_\_\_, in the County of \_\_\_\_\_, the executor (*or* by J. P., the solicitor of A. B., the executor) named in the said will (*or* codicil).

Application received the \_\_\_\_\_ }  
 day of \_\_\_\_\_, 19 \_\_\_\_\_ } *Registrar of the said Court.*  
 This notice mailed the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

6. *Notice to be transmitted by Registrar of a Surrogate Court to the Surrogate Clerk, for Grant of Administration with the Will annexed where no Executor appointed.*

In the Surrogate Court of the County of \_\_\_\_\_  
 To the Surrogate Clerk:

Take notice, that application has been made to the Surrogate Court of the County of \_\_\_\_\_, for a grant of letters of administration with the will and codicil (*or* codicils) annexed, the said will bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_, [and the said codicil (*or* codicils) bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_,] of \_\_\_\_\_ late of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_, having at the time of *his* death a fixed place of abode at \_\_\_\_\_, in the said County of \_\_\_\_\_, [*or* "no fixed place of abode in Ontario," (*or* "resided out of Ontario,") "but having at such time property in the said County of \_\_\_\_\_,] by A. B., of the \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, the residuary legatee (*or as the case may be*) named in the said will (*or* codicil) *or* by J.P., the solicitor of A.B., the residuary legatee named in the said will or codicil) no executor having been named in said will (*or* codicil).

Application received this \_\_\_\_\_ }  
 day of \_\_\_\_\_, 19 \_\_\_\_\_ } *Registrar of the said Court.*  
 This notice mailed the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.



*7. Notice to be transmitted by Registrar of a Surrogate Court to the Surrogate Clerk, of application for grant where Executor has renounced Probate or Residuary Legatee has renounced Administration with Will annexed.*

In the Surrogate Court of the County of  
To the Surrogate Clerk:

Take notice, that application has been made to the Surrogate Court of the County of \_\_\_\_\_, for a grant of letters of administration with the will and codicil (*or* codicils) annexed, the said will bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, [and the said codicil (*or* codicils) bearing date the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, ] of \_\_\_\_\_ late of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, having at the time of *his* death a fixed place of abode at \_\_\_\_\_, in the said County of \_\_\_\_\_, [*or* “no fixed place of abode in Ontario,” (*or* “resided out of Ontario,”) “but having at such time property in the said County of \_\_\_\_\_,”] by A. B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, the residuary legatee (*or as the case may be*) named in the said will (*or* codicil) (*or* by J. P., the solicitor of A. B., the residuary legatee named in the will (*or* codicil), E. F., of the \_\_\_\_\_, of \_\_\_\_\_ in the County of \_\_\_\_\_, the executor (*or* residuary legatee, etc.,) named in the said will, having renounced all right to the probate and execution of the said will, and codicil (if any) *or* to letters of administration to the property of the said deceased.

Application received the }  
day of \_\_\_\_\_, 19 } \_\_\_\_\_  
Registrar of the said Court.

This notice mailed the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

8. *Notice of application for grant of Administration.*

In the Surrogate Court of the County of  
To the Surrogate Clerk:

Take notice, that application has been made to the Surrogate Court of the County of , for a grant of letters of administration of the property of , late of the of in the County of , deceased, who died intestate on or about the day of , A.D. , having at the time of *his* death a fixed place of abode at , in the said County of , [or "no fixed place of abode in Ontario," (or "resided out of Ontario,") "but having at such time property in the said County of ,"] and who died unmarried, without child or parent, brother or sister, nephew or niece, uncle or aunt, (*to be varied according to circumstances of the case*) *him* surviving, by A.B., of the of , in the County of , one of the lawful cousins-german (*or as the case may be*) and next of kin of the deceased, (*or by J. P., the solicitor of A. B.*).

Application received the }  
day of , 19 } Registrar of the said Court.  
This notice mailed the day of , 19

9. *Certificate by the Surrogate Clerk upon notice of application for Grant.*

OFFICE OF THE SURROGATE CLERK.

In the estate of , deceased, named in a certain notice of application to the Surrogate Court of the County of for grant of probate (*or administration, as the case may be,*) . dated the of , 19 , and described therein as , late of , etc. (*copy from notice of application*).

I, , the Surrogate Clerk, do hereby certify that no notice of application, in respect to the property of the said

deceased, has been received by me from any of the Registrars of the Surrogate Courts in Ontario, save the above [*or if another notice has been received add* “and a certain other notice of application from the Registrar of the Surrogate Court of the County of \_\_\_\_\_,” dated the \_\_\_\_\_ day of \_\_\_\_\_, etc., for a grant of the probate of the will bearing date, etc., (*or as in the notice of application.*)]

And I further certify that no caveat or copy of caveat against the grant of probate or administration in the property of the said deceased, has been lodged with or received by me [*or if caveat or notice of caveat has been lodged or received, instead of the above say,* “and I further certify that a caveat (*or copy of a caveat,*) in the property of the said deceased, has been lodged with (*or received by*) me on the \_\_\_\_\_ day of \_\_\_\_\_, etc., a copy of which is hereunto annexed.]

Dated.

.....  
*Surrogate Clerk.*

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10. *Affidavit of time of Death and place of Abode of Testator or Intestate.*

In the Surrogate Court of the County of \_\_\_\_\_  
 In the estate of W. A., deceased.

I, A.B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, make oath and say, that I am [one of the executors (*or the executor*) named in the last will and testament (*or codicil*) of the said W. A., deceased, (*or the party applying for administration of the will and codicil (if any), annexed, or administration of the property of the said W. A., deceased.*)] That said deceased died on or about the \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, at \_\_\_\_\_ and that the said deceased, at the time of *his* death, had *his* fixed place of abode at \_\_\_\_\_, in the said County of \_\_\_\_\_, [or “had no fixed place

of abode in Ontario," (or "resided out of Ontario,") "but had at such time property in the said County of ."]

Sworn at , in the County of  
 , the day of  
 A.D. 19 , before me

A. B.

*Person authorized to administer oaths under the Act.*

### 11. *Affidavit of Value of Property devolving.*

In the Surrogate Court of the County of  
 In the estate of W. A., deceased.

I, A. B., of the of , in the County of  
 , make oath and say, that I am [one of the executors (*or* the executor) named in the last will and testament (*or* codicil) of the said W. A., deceased, (*or* the party applying for administration, with the will and codicil, (*if any*) annexed, *or* administration of the property of the said W. A., deceased).]

That the value of the whole property of the said deceased, which *he* in any way died possessed of or entitled to, and for and in respect to which, ("probate of the said will is," *or* "letters of administration are," to be granted, is under dollars. That the value of the personal estate and effects is under dollars, and of the real estate is under dollars and that full particulars and a true appraisement of all said property are exhibited herewith.

Sworn at , in the County of  
 , the day of  
 A.D. 19 , before me

A. B.

*Person authorized to administer oaths under the Act.*



12. *Affidavit of Search for Will.*

In the Surrogate Court of the County of  
In the estate of J. T., deceased.

I, A.B., of the                      of                      , in the County of  
make oath and say, that I am the party applying for adminis-  
tration of the property of the said J. T., late of                      , in the  
County of                      , deceased. That I have made diligent and  
careful search in all places where the deceased usually kept *his*  
papers, and in *his* depositories, and in the office of the Registrar  
of this Court, in order to ascertain whether the deceased had or  
had not left any will; but that I have been unable to discover  
any will, codicil, or testamentary paper, and I verily believe  
that the deceased died without having left any will, codicil, or  
testamentary paper whatsoever.

Sworn at                      , in the County of                      }  
                    , the                      day of                      ,                      A. B.  
A.D. 19                      , before me                      }

*Person authorized to administer oaths under the Act.*

NOTE.—Where the search in the office of the Registrar has  
not been made by the deponent personally, omit the words “and  
in the office of the Registrar of this Court.” A certificate of  
the Registrar may be obtained under Rule 6.

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13. *Affidavit of execution of Will by Subscribing Witness to a  
Will executed after 31st December, 1873.*

In the Surrogate Court of the County of  
In the estate of A.B., deceased.

I, C.B., of the Township of                      , in the County of  
                    , make oath and say

1. That I knew A. B., late of the                      , of                      in the  
County of                      ,                      , deceased.

2. That on or about the                      day of                      in the year  
of Our Lord One thousand eight hundred and                      I was  
personally present and did see the paper writing hereto annexed  
marked A., signed by the said A. B., as the same now appears  
as and for *his* last will and testament, and that the same was so  
signed by the said A. B., in the presence of me and of E. F., of  
the                      of                      in the County of                      ,                      , who  
were both present at the same time; whereupon the said E. F.  
and I did at the request of the said A. B. and in *his* presence,  
attest and subscribe the said will.

Sworn before me at the \_\_\_\_\_ of \_\_\_\_\_  
 \_\_\_\_\_, in the County of \_\_\_\_\_, } C. D.  
 the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Person authorized to administer oaths under the Act.*

14. *Affidavit of execution of Will by Subscribing Witness to Will  
executed before 1st January, 1874.*

In the Surrogate Court of the County of  
In the estate of A. B., deceased.

I, C. D., \_\_\_\_\_, of the Township of \_\_\_\_\_, in the County of \_\_\_\_\_, make oath and say, that I knew A. B., late of \_\_\_\_\_ deceased; that on or about the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_, I was present and did see the said A. B., \_\_\_\_\_ sign and declare the paper writing hereunto annexed as, and for, the last will and testament of the said A.B.; that I, deponent [and E. F., of etc. (if there be a second subscribing witness)], did subscribe my name as witness (*or* our names as witnesses) to the execution of the said will, at the request of the said *testator*, in *his* presence, and in the presence of each other (*or, as the case may be*); and lastly, that the name \_\_\_\_\_ (*or* several

names) subscribed as witnesses to the execution of the said will are of the proper handwriting of this deponent and the said E. F., respectively).

Sworn before me at \_\_\_\_\_, \_\_\_\_\_ } C. D.  
in the County of \_\_\_\_\_, \_\_\_\_\_ }  
this \_\_\_\_\_ day of \_\_\_\_\_ A.D. 19 \_\_\_\_\_ }

*Person authorized to administer oaths under the Act.*

### 15. *Oath of Executor.*

In the Surrogate Court of the County of

In the estate of \_\_\_\_\_, deceased.

I, \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_, \_\_\_\_\_, make oath and say, that I believe the paper writing (*or* the paper writings) hereto annexed marked with the letter “ \_\_\_\_\_,” to contain the true and original last will and testament [and codicil (*or* codicils)] of \_\_\_\_\_, late of the \_\_\_\_\_, in the County of \_\_\_\_\_, \_\_\_\_\_; that I am the sole executor (*or* one of the executors) therein named (*or* executor according to the tenor thereof—executor during life—executrix during widowhood (*or as the case may be*)), and that I will faithfully administer the property of the said *testator*, by paying *his* just debts and the legacies contained in *his* will (*or* will and codicils), so far as the same will thereunto extend and the law bind me, and by distributing the residue (if any) of the estate according to law; and that I will exhibit under oath a true and perfect inventory of all and singular the property of the *testator*, and render a just and full account of my executorship when thereunto lawfully required.

Sworn at \_\_\_\_\_, in the County of \_\_\_\_\_, }  
the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_, } A. B.  
before me \_\_\_\_\_

*Person authorized to administer oaths under the Act.*

16. *Oath of Administrator with Will.*

In the Surrogate Court of the County of

In the estate of , deceased.

I, , of the of , in the County of , make oath and say, that I believe the paper writing (*or* the paper writings) hereto annexed, marked with the letter “ ,” to contain the true and original last will and testament [and codicil (*or* codicils)] of , late of the of , in the County of , and that the executor therein named (is dead, not having taken out probate, *or* has renounced all right and title to the probate and execution of the said will, *or, as the fact may be*), and that I am the residuary legatee in trust named therein, (*or as the fact may be*), and that I will faithfully administer the property of the said deceased, according to the tenor of *his* will (*or* will and codicils), by paying *his* just debts and the legacies contained in *his* will (*or* will and codicils), so far as the same shall thereto extend and the law bind me, and distributing the residue (if any) of the estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said *testator*, and render a just and true account of my administration when thereunto lawfully required.

Sworn at	, in the County of	}	A. B.
this	day of , A.D. 19		
before me			

*Person authorized to administer oaths under the Act.*

*Note.*—See Rule 11.

17. *Oath of Administrator.*

In the Surrogate Court of the County of

In the estate of , deceased.

I, , of the of , in the County of , make oath and say, that late of the



of \_\_\_\_\_, in the \_\_\_\_\_, \_\_\_\_\_, deceased, died a bachelor, without leaving parent, brother or sister, uncle or aunt, nephew or niece (*as the case may be*), and intestate; that I am the lawful cousin-german and one of the next of kin of the deceased (*alter in accordance with the circumstances of the case*); that I will faithfully administer the property of the deceased by paying *his* just debts and distributing the residue (if any) of *his* estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at \_\_\_\_\_, in the County of \_\_\_\_\_, }  
 the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_ } A. B.  
 before me

*Person authorized to administer oaths under the Act.*

*Note.*—See Rule 11.

#### 18. Administration Bond.

Know all men by these presents: That we, A.B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, C.D., of the, etc., and E.F., of the, etc., are jointly and severally bound unto G.H., the Judge of the Surrogate Court of the County of \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars, to be paid to the said G.H., or the Judge of the said Court for the time being; for which payment, well and truly to be made, we bind ourselves and each of us for the whole, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord, 19 \_\_\_\_.

The condition of this obligation is such, that if the above-named A.B., the administrator of all the property (*or as the case may be*), of \_\_\_\_\_, late of the \_\_\_\_\_, in the County of \_\_\_\_\_, deceased (who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_), do, when lawfully called on in that behalf,

make or cause to be made a true and perfect inventory of all the property of the said deceased, which has or shall come into the hands, possession, or knowledge of the said A.B., or into the hands and possession of any other person or persons for *him*, and the same so made, do exhibit or cause to be exhibited into the Registry of the Surrogate Court of the County of \_\_\_\_\_, whenever required by law so to do, and the same property, and all other property of the said deceased at the time of *his* death, which at any time after shall come into the hands or possession of the said A.B., or into the hands or possession of any other person or persons for *him*, do well and truly administer according to law: (that is to say) do pay the debts which the deceased did owe at *his* decease, and further, do make, or cause to be made, a just and full account of *his* said administration, when thereunto lawfully required, and all the rest and residue of the said property do deliver and pay unto such person or persons respectively, as shall be entitled thereto under the provisions of any Act of the Legislature now in force, or that may hereafter be in force in Ontario; and if it shall hereafter appear that any last will or testament was made by the deceased, and the executor or executors therein named do exhibit the same unto the said Court, making request to have it allowed and approved accordingly, if the said A.B., being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court; then this obligation to be void and of no effect, or else to remain in full force and virtue.

Signed, sealed and delivered in the presence of	}	[L.S.]
		[L.S.]
		[L.S.]

19. *Administration Bond for Administrator with Will Annexed.*

Know all men by these presents: That we, A.B., of the  
of \_\_\_\_\_ in the County of \_\_\_\_\_, C.D., of the etc.,

and E.F., of the, etc., are jointly and severally bound unto G.H., the Judge of the Surrogate Court of the County of \_\_\_\_\_, in the sum of \_\_\_\_\_ dollars, to be paid to the said G.H., or the Judge of the said Court for the time being, for which payment, well and truly to be made, we bind ourselves and each of us for the whole, our and each of our heirs, executors, administrators, firmly by these presents. Sealed with our seals. Dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord, 19 \_\_\_\_.

The condition of this obligation is such, that if the above named A.B., the administrator of all the property (*or as the case may be*) of \_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, \_\_\_\_\_, deceased, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 19 \_\_\_\_, do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the property which has or shall come into the hands, possession, or knowledge of the said A.B., or into the hands and possession of any other person or persons for *him*, and the same so made, do exhibit or cause to be exhibited into the Registry of the Surrogate Court of the County of \_\_\_\_\_, whenever required by law so to do, and the same property and all other the property of the said deceased at the time of *his* death, which at any time after shall come into the hands or possession of the said A.B., or into the hands or possession of any other person or persons for *him*, do well and truly administer according to law; that is to say, do pay the debts which the said deceased did owe at *his* decease, and then the legacies contained in the said will annexed to the said letters of administration to the said A.B. committed, so far as such property shall thereunto extend and the law bind him; (a) and further do make or cause to be made, a full, true, and just account of his said administration when thereunto lawfully required, and all the rest and residue of the property, shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation

to be void and of no effect, or else to remain in full force and virtue.

Signed, sealed and delivered in the presence of	}	[L.S.]
		[L.S.]
		[L.S.]

(a) *Here insert, if necessary, a clause under section 58 of the Act.*

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### 20. *Affidavit of Justification by Sureties.*

In the Surrogate Court of the County of

In the estate of , deceased.

We, C.D., of the of , in the County of , Yeoman, and E.F., of the of , in the County of , Esquire, severally make oath and say that we are the proposed sureties on behalf of the intended administrator of the property (*or as the case may be*) of , deceased, in the within bond named, for the faithful administration of the said property (*or as the case may be*) of the said deceased; and I, the said C.D., for myself make oath and say that I reside at the of , in the County of , and am worth property to the amount of dollars over and above all encumbrances, and over and above what will pay my just debts and every other sum for which I am now bail, or for which I am liable as surety or endorser or otherwise; and I, the said E. F., for myself make oath and say that I reside at the of , in the County of , and am worth property to the amount of dollars over and above all encumbrances, and over and above what will pay my just debts and every other



sum for which I am now bail or for which I am liable as surety or endorser or otherwise.

The above named deponents, C.D. and E.F. were	}	
severally sworn before me the       day of       ,		C.D.
A.D. 19       , at the       of       , in the County		E.F.
of		

*Person authorized to administer oath under the Act.*

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*Note.*—For form of jurat, see Rule 38.

### 21. *Probate.*

#### CANADA:

Province of Ontario.

In His Majesty's Surrogate Court in the County of

Be it known, that on the       day of       , A.D. 19       , the last will and testament (*or* the last will and testament with codicils) of       , late of the       of       in the County of       ,       , who died on or about the       day of       , A.D. 19       , at       , and who at the time of *his* death had a fixed place of abode at       , in the said County of       , [*or* “had no fixed place of abode in Ontario,” (*or* “resided out of Ontario,”) “but had at such time property in the said County of       ,”], was proved and registered in the said Surrogate Court, a true copy of which said last will and testament is hereunder written (*or* true copies of which said last will and testament, and codicil, are hereunto annexed), and that the administration of all and singular the property of the said deceased, and any way concerning *his* will, was granted by the aforesaid Court to       , of the       of       , in the County of       ,       , the sole executor (*or as the case may be*) named in the said will (*or* codicil) *he* having been first sworn well and faithfully to administer the same by paying the just debts of the deceased, and the legacies contained in *his* will

[L.S.] . . . . .

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## CANADA :

}

Be it known, that \_\_\_\_\_ late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, who died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, and who at the time of *his* death had a fixed place of abode at the \_\_\_\_\_ of \_\_\_\_\_, in the said County of \_\_\_\_\_ [or “had no fixed place of abode in Ontario,” (or “resided out of Ontario,”) but had at such time property in the said County of \_\_\_\_\_,”] made and duly executed *his* last will and testament (with codicils), and did therein name \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, in, etc., \_\_\_\_\_, executor thereof [or named no executor therein], a true copy of which said last will and testament is hereunder written (or true copies of which said last will and testament, and \_\_\_\_\_ codicils, are hereunder written); and be it further known that on the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_, letter of administration, with the said will (and codicils) annexed, of all and singular the property (or *as the case may be if grant limited*) of the said deceased, were granted by His Majesty’s Surrogate Court of the County of \_\_\_\_\_, to \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_, (insert

*the character in which the grant is taken, and if executor has renounced, state it), he, the said                      having previously been sworn well and faithfully to administer the same according to the tenor of the said will, by paying the just debts of the deceased, and the legacies contained in his will (or will and codicil), so far as the same shall thereunto extend and the law bind him, and by distributing the residue (if any) of the property according to law, and to exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and to render a just and full account of his administration when thereunto lawfully required.*

[L.S.]                      .....

*Registrar of the Surrogate Court of the County of*

*Note.*—The grant should show on its face how all prior interests have been cleared off. Rule 11.

### 23. *Letters of Administration.*

CANADA:

Province of Ontario.

In His Majesty's Surrogate Court of the County of

Be it known, that on the                      day of                      , A.D. 19   , letters of administration of all and singular the property (*or as the case may be if grant limited*) of                      , late of the                      of                      , in the County of                      ,                      , who died on or about the                      day of                      , 18   , at                      , intestate, and had at the time of *his* death a fixed place of abode at the                      of                      , in the said County of                      [*or "had no fixed place of abode in Ontario" (or "resided out of Ontario,"*) "*but had at such time property in the County of                      ,*"] were granted by Her Majesty's Surrogate Court of the County of                      , to                      , of the                      of                      , in the County of                      , the widow (*or as the case may be*) of the said in-

testate, *she* having been first sworn faithfully to administer the same by paying *his* just debts, and distributing the residue (if any) of *his* property according to law, and to exhibit under oath a true and perfect inventory of all and singular the said property, and to render a just and full account of *her* administration when thereunto lawfully required.

[L.S.] .....

*Registrar of the Surrogate Court of the County of*

*Note.*—See Rule 11.

#### 24. *Double Probate.*

CANADA: }  
Province of Ontario. }

In His Majesty's Surrogate Court of the County of

Whereas on the                      day of                      , A.D. 19    , the last will and testament (*or* the last will and testament with codicils) of                      , late of the                      of                      , in the County of                      ,                      , who died on or about the                      day of                      , A.D. 19    , at                      , and who at the time of *his* death had a fixed place of abode at                      , in the said County of                      [or “had no fixed place of abode in Ontario” (*or* “resided out of Ontario”) “but had at such time property in the said County of                      ,”] was proved and registered in the said Surrogate Court, a true copy of which said last will and testament is hereunto annexed (*or* true copies of which said last will and testament and codicil are hereunto annexed) and that the administration of all and singular the property of the said deceased, and any way concerning *his* will, was granted by the aforesaid Court to                      , of the                      of                      , in the County of                      ,                      , one of the executors named in the said will (*or* codicil); power being reserved of making the like grant to                      , of the                      of                      , in the County of



, the other executor named in the said will, when he should apply for the same. Be it therefore known, that on the                    day of                   , A.D. 19   , the said will of the said deceased was also proved by, and the like administration of all and singular the property of the said deceased and any way concerning *his* will was granted to the said                   , *he* having been first duly sworn well and faithfully to administer the same by paying the just debts of the deceased and the legacies contained in *his* will (or will and codicil) so far as he is thereunto bound by law, and by distributing the residue (if any) of the property according to law, and to exhibit under oath a true and perfect inventory of all and singular the said property, and to render a just and full account of *his* executorship when thereunto lawfully required.

[L.S.]                    .....

*Registrar of the Surrogate Court of the County of*

---

25. *Exemplification of Probate or Letters of Administration with Will Annexed.*

CANADA:                    }  
Province of Ontario.        }

In His Majesty's Surrogate Court of the County of

Be it known, that upon search being this day made in His Majesty's Surrogate Court of the County of                   , it plainly appears that on the                    day of                   , A.D. 19   , the last will and testament (with                    codicils) of                   , late of the                   , of                   , in the County of                   , deceased, who died at                   , on or about the                    day of                   , 19   , and had at the time of *his* death a fixed place of abode at the                    of                   , in the said County of                    (or as the case may be) was proved by                    of the                    of                    in the County of                   ,                   , the executor there-

in named [or that on the                      day of                      , A.D. 19    , letters of administration with the last will and testament (and codicils) annexed, of the property of                      , late of, etc                      , were granted to                      of the                      of                      , in the County of                      ] and which said probate (or letters of administration) now remains of record in the said Surrogate Court. The true tenor of the said probate (or letters of administration with the will annexed) is in the words following, to wit: (*here let grant be recited verbatim.*)

In faith whereof these letters testimonial are issued.

Given at the                      of                      , in the County of                      , this                      day of, etc.

[L.S.]                      .....

*Registrar of the Surrogate Court of the County of*

---

## 26. Exemplification of Letters of Administration.

### CANADA :

Province of Ontario.

In His Majesty's Surrogate Court of the County of

Be it known, that upon search being this day made in His Majesty's Surrogate Court of the County of                      , it plainly appears that on the                      day of                      , A.D. 19    , letters of administration of all and singular the property of                      , late of the                      of                      , in the                      of                      ,                      , who died at                      , on or about the                      day of                      , 19    , and had at the time of *his* death, a fixed place of abode at                      ,                      , in the said County of                      , were granted to                      , of the                      of                      , in the County of                      , and which said letters of administration now remain of record in the said Surrogate Court. The true tenor of the

said letters of administration is in the words following, to wit:  
*[here the letters of administration are to be recited verbatim].*

In faith whereof these letters testimonial are issued.

Given at the                      of                      , in the County of                      ,  
 this                      day of, etc.

[L.S.]                      .....

*Registrar of, etc.*

27. *Renunciation of Probate or of Administration with the Will Annexed.*

In the Surrogate Court of the County of

Whereas A.B., late of                      , in the County of                      ,  
                     , deceased, died on or about the                      day of                      ,  
 19                      , and had at the time of his death a fixed place of abode at  
                     , in the said County of                      , and whereas *he* made  
 and duly executed *his* last will and testament, bearing date the  
                     day of                      , 19                      , and thereof appointed C.D. exé-  
 cutor [*or as the case may be* as I am informed and believe.

Now I, the said C.D., do hereby expressly renounce all my  
 right and title to the probate and execution of the said will [*and*  
*codicils, if any*] of the said deceased.

In witness whereof I have hereunto set my hand and seal,  
 this                      day of                      , 19                      .

Signed, sealed and delivered  
 in the presence of E.H.

}                      C.D.                      [Seal.]

NOTE.—*The above form may be varied when the renunciation is by the widow or other person entitled to administration with the will annexed. In each case there must be an affidavit of execution.*

28. *Renunciation of Administration.*

In the Surrogate Court of the County of

Whereas A. B., late of the                      of                      , in the County of                      , deceased, died on or about the                      day of                      19                      , intestate (*a widower*), and had at the time of *his* death a fixed place of abode at the                      of                      , in the said County of                      , and *whereas* I, C. D., of the                      of                      , in the County of                      ,                      , am *his* lawful and *his* only next of kin, [*to be varied according to the facts.*]

Now I, the said C. D., do hereby expressly renounce all my right and title to letters of administration of the property of the said deceased.

In witness whereof I have hereunto set my hand and seal, this                      day of                      , 19                      .

Signed, sealed and delivered                      }  
in the presence of E. H.                      } C.D.                      [Seal.]

*Note.—An affidavit of execution required.*

29. *Election by Minors of a Guardian.*

(*Ante Rule 17.*)

In the Surrogate Court of the County of

Whereas A. B., late of the                      of                      , in the County of                      , deceased, died on or about the                      day of                      , 19                      ; at                      , in, etc., intestate, a widower (*or widow*), leaving C. D., E. F., and G. H., *his* lawful children, and only next of kin, the said C. D. being a minor of the age of *twenty* years only, and the said E. F. being also a minor of the age of *nineteen* years only, and the said G. H. being an infant of the age of *six* years only:



Now we, the said C. D. and E. F., do hereby make choice of and elect K. L., of the                      of                      , in the County of                      ,                      , our lawful maternal uncle and one of our next of kin (*or as the case may be*), to be our guardian, for the purpose of his obtaining letters of administration of the property of the said A. B., deceased, to be granted to *him* until one of us attain the age of twenty-one years, [*or for the purpose of renouncing for us, and on our behalf, all right, title, and interest to and in letters of administration, etc., as the case may be.*]

In witness whereof we have hereunto set our hands and seals, this                      day of                      , A.D. 19                      .

Signed, sealed and delivered	}	[L.S.]
in the presence of		[L.S.]

NOTE.—*An affidavit of execution required.*

### 30. Judge's Order to bring in a Testamentary Paper.

In the Surrogate Court of the County of                      .

Upon the application of A. B., of the                      of                      in the County of                      ,                      , and upon reading the affidavit of C. D., of the                      of                      , in the County of                      , this day filed in the said Court, shewing that a certain original paper or script being or purporting to be testamentary, (*here describe the paper*), is now in the possession or under the control of E. F., of the                      of                      , in the County of                      , I do order that the said E. F., shall within ten days (*or the time prescribed by the Judge*), after the service hereof on *him* bring into and leave in the office of the Registrar of the said Court, the said original paper now in *his* possession or under *his* control; or in case the said original paper be not in *his* possession or under *his* control, that *he* shall with-

in      days after the service hereof upon *him*, file in the said office an affidavit to that effect, and therein set forth what knowledge, if any, *he* has of and respecting the said original paper or script.

Dated at              the              day of              , 19      .  
Judge.

### 31. *Affidavit of Plight and Condition and Finding.*

In the Surrogate Court of the County of

In the estate of              , deceased.

I, A. B., etc., make oath and say, that I am the sole executor named in the paper-writing now hereunto annexed, purporting to be and contain the last will and testament of C.D., late of., etc., deceased, who died on or about the              day of              , at              , and had at the time of *his* death a fixed place of abode at              , in the said County (*or as the case may be*), the said will bearing date the              day of              , beginning thus              ending thus              and being subscribed thus "C.D." and having viewed and perused the said will, and particularly observed that [*here recite the finding of the said will and the various alterations, erasures and interlineations (if any), and the general plight and condition of the will, or any other matter requiring to be accounted for, and clearly trace the will, from the possession of the deceased in his lifetime, up to the time of making the affidavit;*] I, lastly make oath that the same is now in all respects in the same state, plight and condition as when

(*as the case may be.*)

Sworn at              , in the County of              ,  
     the              day of              , A.D. 19      ,  
     before me              }      A. B.

.....

NOTE.—*The above form may be varied to suit the case of a codicil.*

32. *Caveat.*

In the Surrogate Court of the County of

Let nothing be done in the estate of A. B. late of the  
 of , in the County of , deceased who  
 died on or about the day of , 19 , at ,  
 and had at the time of his death a fixed place of abode  
 at , in the County of [or "who had no fixed  
 place of abode in Ontario," (or "who resided out of Ontario,")  
 "but had at such time property in the County of ,," or  
 in the several Counties of ,)] unknown to C.D., of the  
 , etc., [or to E. F., of , the Solicitor of C. D.,  
 of , etc.] The said C. D. is the lawful child and the  
 only next of kin (or as the case may be) of the said deceased.  
 The grounds on which this caveat is entered are, that the paper-  
 writing, alleged to be the will of the deceased, was not executed  
 by him (or as the case may be).

C. D., of (P. O. Address.)

Or E. F., Solicitor for C. D., of (P. O. Address).

33. *Warning to Caveat.*

In the Surrogate Court of the County of

To C. D., of , etc., (or to E. F., of , etc., the  
 Solicitor of C.D., of , etc.).

At the instance of R. S., of , etc., you are hereby  
 warned, that within ten days after the service of this warning  
 upon you, inclusive of the day of such service, you cause an  
 appearance to be entered for you in the office of the Surrogate  
 Court of the County of , to the caveat entered by you  
 in the estate of , late of , etc., who died on or  
 about the day of , 19 , at , and had  
 at the time of his death a fixed place of abode at (as  
 stated in the caveat), and to set forth your (or your client's)

interest, and take notice that in default of you so doing, the said Court will proceed to do such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

Dated at                      , the                      day of                      , 19   .

.....

*Registrar.*

---

34. *Notice of Caveat being lodged with Registrar of Surrogate Court.*

In the Surrogate Court of the County of  
To the Surrogate Clerk:

In the estate of                      , deceased.

A caveat, of which the following is a copy, has this day been lodged with me: "Let nothing," etc., (*here copy caveat at length and verbatim*).

Dated at                      , the                      day of                      , 19   .

.....

*Registrar.*

---

35. *Bond on Appeal to Court of Appeal.*

KNOW ALL MEN BY THESE PRESENTS:

That we, A. B., of, etc., C. D., of, etc., and E. F., of, etc., are jointly and severally held and firmly bound unto G.H., of, etc. (*the respondent*), in the penal sum of two hundred dollars, for which payment to be well and truly made, we bind ourselves, and each of us by *himself*, our heirs, executors and administrators, firmly by these presents. Sealed with our seals. Dated the                      day of                      , 19   .

Whereas,                      (*the appellant*) considers *himself* aggrieved by a certain order (*or as the case may be*) made by the Surrogate Court of the County of                      (*or by the Judge of, etc.*),



on or about the                      day of                      , last, in a certain (*men-  
tion matter or cause in which order made*), and whereas the  
value of the goods and chattels affected by the said order (*or as  
the case may be*) exceeds \$200, and the said                      (*the appel-  
lant*), desires to appeal therefrom to the Court of Appeal. (a)

Now the condition of this obligation is such that if the said  
                    (*the appellant*) shall effectually prosecute *his* appeal  
and pay such costs, charges and expenses as shall be awarded in  
case the said order (*or as the case may be*) shall be affirmed or  
in part affirmed, then this obligation to be void, otherwise to  
remain in full force.

Signed and sealed in presence of	}	A. B., [L.S.]
.....		C. D., [L.S.]
		E. F., [L.S.]

(a) The appeal is now "to a Divisional Court of the High  
Court."

See the Surrogate Courts Act, sec. 36.

BOOKS TO BE KEPT BY REGISTRARS OF THE SURROGATE COURTS.  
SURROGATE COURT, COUNTY OF

36. *Non-Contentious Business Book.*

No. of Application.	Name, Residence, and Addition of Deceased.			Time of Death.	When application received.	Name, Residence, and Addition of Applicant.			Nature of Application.	When Notice to Surrogate Clerk mailed.	When Certificate of Surrogate Clerk received.	Nature of matter certified.	Date and nature of order or direction by Judge with reference to Grant Book, if grant ordered.	Collateral proceedings with references to the entries in other books.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.						
1	J. Jones	Town of Barrie, County of Simcoe.	Esquire.	10th Sept., 1888.	1st Oct., 1888.	J. Jones	Town of Collingwood, County of Simcoe.	Merchant.	For Probate of will as sole Executor.	1st Oct., 1888.	4th Oct., 1888.	No other application—No Caveat.	5th Oct., 1888, for grant, same day Probate issued—see No. 6, page 12, on Grant Book.	Collateral proceedings with references to the entries in other books.
2	Jn. Day	Vespra, County of Simcoe.	Carpenter.	20th Sept., 1888.	2nd Oct., 1888.	R. Day.	Flos, County of Simcoe.	Mason.	For letters of administration as next of kin.	4th Oct., 1888.	7th Oct., 1888.	No other application—No Caveat.	8th Oct., 1888, widow of deceased to be cited.	Order citing Mary Day 8th Oct., 1888 Process Book, page —

## SURROGATE COURT, COUNTY OF

37. *Grant Book.*

No. of Grant.	Name, Residence, and Addition of Deceased.			Time of Death.	Date of Grant.	Name, Residence, and Addition of Executors or Administrators.			Nature of Grant.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.	
1	Adams, James.	Barrie.	Esquire.	24th July, 1888.	24th Sept., 1888.	James Jones and Thomas Jones, Executors.	Barrie.	Esquire.	Probate of Will, and Codicil.

SURROGATE COURT, COUNTY OF

38. *Process Book.*

FORMS.

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No. of Process.	Name, Residence, and Addition of Deceased.			Name of Applicant.	Nature of Process, to whom Directed, or whom to be Affected.	When Issued.	When Returnable.	Action thereon.
	Name.	Residence.	Addition.					
1	John Dick.	Mono Mills, County of Simcoe.	Yeoman.	Mary Dick.	Order to Thomas Smith to bring in Script.	9th Oct., 1888.	Ten days after Service.	



SURROGATE COURT, COUNTY OF

39. *Caveat Book.*

No. of Appli- cation.	Name, Residence, and Addition of Deceased.			When Caveat lodged.	Name, Residence, and Addition of Party entering.			Nature of party's in- terest in the estate of de- ceased.	Address as given in Caveat.	When No- tice sent to Surrogate Clerk.	If Caveat warned when.
	Name.	Residence.	Addition.		Name.	Residence.	Addition.				
4	Moses Mack	Town of Bradford, County of Simcoe.	Esquire.	1st Oct., 1883.	John Mack.	City of Toronto.	Esquire.	As next of kin.	42 Bay St., Toronto.	2nd Octo- ber, 1883.	

## 40. APPLICATION BOOK.

*Office of the Surrogate Clerk.*

No. of Notice of Appli- cation.	Name, Residence, and Addition of Deceased.			Time of Death.	When Notice receiv- ed.	Name, Residence, and Addition of Applicant.			Nature of Appli- cation.	Court in which Appli- cation made.	When Certifi- cate of Surro- gate Clerk mailed.	Note of matter Certi- fied.
	Name.	Residence	Addition.			Name.	Residence	Addition.				
	Edw. Tucker	amilton.	Merchant	1st. Jan., 1888.	28th Sept., 1888.	Jno. Dean	Hamilton.	Surveyor.	For Pro- bate as Execu- tor.	of Went- worth.	27th Sept., 1888.	No other Appli- cation. No Caveat.

## 41. CAVEAT BOOK.

*Office of the Surrogate Clerk.*

No. of Caveat	Name, Residence, and Addition of Deceased.			When Caveat or copy of Caveat received	If a copy of Caveat from what Court received.	Name, Residence, and Addition of party entering.			Nature of party's interest in goods of decedent ceased.	Address as given in Caveat.	If notified to the Registrar of a Sur- rogate Court, when and number of notice of application upon which notification made.
	Name.	Residence.	Addition.			Name.	Residence.	Addition.			
1	Jno. Jones	London.	Carpenter	24th Sept., 1888.	Of Middle- sex.	William Jones.	London.	Carpenter.	As next of kin or "resi- duary legat- tee," (or as the case may be).	10 Rich- mond Street, London, Ont.	

## 42. GRANT BOOK.

*Office of the Surrogate Clerk.*

Name, Residence, and Addition of Deceased.			Time of Death.	Date of Grant.	Name of Executors or Administrators.	Nature of Grant.	In what Court.
Name.	Residence.	Addition.					
Adam, James.	Toronto.	Esquire.	24th July, 1888.	24th Sept., 1888.	James Jones and Thomas Jones, Executors.	Probate of Will and Codicil.	Of York.



## CONTENTIOUS BUSINESS.

## FORMS.

## I. STATEMENT OF CLAIM.

In the Surrogate Court of the County of  
 In the estate of A. B., deceased,  
 Between R.S., Plaintiff, and C.D., Defendant.

1. *Statement of Claim.*

The plaintiff is cousin-german and one of the next of kin of  
 A. B., late of the                      of                      in the County of                      ,  
                     , who died on or about the                      day of                      A.D.  
 19                      , a widower, without child, parent, brother or sister, uncle  
 or aunt, nephew or niece.

The plaintiff claims a grant to *him* of letters of administra-  
 tion of the property of said deceased.

Delivered this                      day of                      , A.D. 19                      , by E. F.  
 of                      , Plaintiff's solicitor.

2. *Formal commencement as above.*

The plaintiff is the executor appointed under the will of A.  
 B. deceased, late of the                      of                      in the County of                      ,  
                     , who died on or about the                      day of                      ,  
 A.D. 19                      .

The said will bears date the                      day of                      A.D.  
 19                      , and a codicil thereto bears date the                      day of                      ,  
 A.D., 19                      .

The plaintiff claims that the Court shall decree probate of  
 the said will and codicil in solemn form of law.

(*Formal conclusion as above.*)

3. *Formal commencement as above.*

The plaintiff claims to be executor, etc. (*as before*) and to  
 have the probate of a pretended will of the said deceased, dated  
 the                      day of                      , granted by this Court, revoked.

R. L.

*Plaintiff's Solicitor.*

4. *Formal commencement as above.*

The plaintiff claims to be executor, etc., *as before.*

The plaintiff claims that the grant of letters of administration of the property of the said deceased, obtained by M. N., the Defendant, should be revoked and probate of the said will granted to him.

R. L.

*Plaintiff's Solicitor.*

5. *Statute of Defence.*

1. *Formal commencement as in statement of claim.*

The defendant is nephew and next of kin of the deceased, being the son of W. B., the brother of the deceased, who died in his lifetime.

The defendant claims that the Court pronounce that he is the nephew and next of kin of the deceased and entitled to a grant of letters of administration of the property of the deceased.

*(Formal conclusion as in statement of claim above.)*

6. *Formal commencement as above.*

(a) The said alleged will and codicils of the deceased were not nor was either of them duly executed in accordance with the provisions of "The Wills Act of Ontario."

(b) The deceased at the time the said alleged will and codicil respectively purport to have been executed was not of sound mind, memory, and understanding.

(c) The execution of the said alleged will and codicil was obtained by the undue influence of the plaintiff, [and others acting with him whose names are at present unknown to the defendant, *(or as the case may be)*].

(d) The executor of the said alleged will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge being *(here state the nature of the fraud.)*

(e) The deceased at the time of the execution of the said alleged will and codicil did not know and approve of the contents thereof, *or* of the contents of the residuary clause of the said will, (*or as the case may be*).

(f) The deceased made his true last will and testament dated the            day of            , A.D. 19    , and thereby appointed the defendant sole executor thereof.

*(Here add any other grounds of defence.)*

And the defendant claims:

1. That the Court will pronounce against the said alleged will and codicil propounded by the plaintiff.

2. That the Court will decree probate of the said will of the deceased dated the            day of            A.D. 19    , (*the will put forward by defendant*) in solemn form of law.

*(Formal conclusion as above).*

# SURROGATE COURTS ONTARIO.

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## GUARDIANS AND INFANTS.

### RULES, ETC.

For the authority under which these Rules are made see section 21 of the Act Respecting Infants R.S.O. 1897, chapter 168.

The Judges of the Supreme Court of Judicature for Ontario do, in pursuance of the powers conferred upon them by the Revised Statutes of Ontario (1887), chapter 137, section 20, and chapter 50, section 78, order and direct that the rules, orders, and directions hereinafter set forth shall be the general rules for regulating the practice and procedure under the several Acts of the Legislature of Ontario, in force respecting the persons and estates of infants and the appointment of guardians.

#### *Practice by Analogy of Probate and Administration.*

1. In all matters and applications touching or relating to the appointment, control or removal of guardians of infants, and the security to be given by such guardians, the custody or control of or right of access to infants, the maintenance of infants or otherwise, the practice and procedure in the Surrogate Courts shall conform as nearly as the circumstances of the case will admit to the practice and procedure of the said Courts, in respect to applications for, and grants of probate and administration, and the forms following, or forms to the like effect shall be used.

#### *Proofs required of Guardian.*

2. Upon application for guardianship there shall be furnished proof of the time of death, and place of abode of the deceased parent or parents, of the value of the whole property devolving, of the value of the personal property and of the real estate respectively, of the annual value of the same, of the names,



ages, and places of abode of the infants, of the relationship of the applicant to such infants, and such other proof as the Judge may require. All such proof may be included in one or several affidavits of the petitioner, or of some other person or persons having knowledge of the facts.

*Certificate of Surrogate Clerk.*

3. Unless under special order or decree of the Judge, letters of guardianship shall not be granted until the Registrar shall have received the certificate of the Surrogate Clerk touching the same.

*Caveats.*

4. Parties may lodge a caveat against the grant of letters of guardianship in like manner as other caveats are lodged, and the practice in respect to the same shall conform as nearly as may be to the practice in the case of caveats against the grant of administration.

*Form of Bond.*

5. When the security given by guardians is a bond it shall be as prescribed in Form 4, *post*. And the securities in such bond are required in all cases to justify to an amount or amounts, which in the aggregate shall equal the amount of the penalty of the bond.

*Books to be kept.*

6. The several Registrars and the Surrogate Clerk shall keep books in tabular form, and the same shall be duly indexed.

*Fees of Registrars, Etc.*

7. Registrars and officers of the Surrogate Courts shall, for the performance of duties and services in said guardianship matters, be entitled to take and receive to their own use the fees prescribed in the Tariff.

*Fees to be paid before grant.*

8. Before proceedings are taken, the fees payable to the Judges and to Registrars, and in stamps for the Fee Fund (and

postage when necessary), shall be paid to the Registrar in the first instance by the party on whose behalf proceedings are to be taken.

*Fees of Solicitors and Counsel.*

9. Solicitors and counsel in the said Courts shall be entitled to take for the performance of duties and services in said guardianship matters, the fees and costs prescribed in the Tariff.

*Duties of Surrogate Clerk.*

10. The duties required of the Surrogate Clerk in respect to matters and causes testamentary, so far as may be applicable, shall be performed by him in respect to applications for letters of guardianship, and in relation to guardianship business.

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FORMS IN GUARDIANSHIP MATTERS.

1. *Application for Letters of Guardianship by one of the next of kin of infant children of a deceased widower.*

Unto the Surrogate Court of the County of  
The petition of A. B., of the                      of                      , in the  
County of                      ,                      .

Humbly sheweth,

That C. F., late of the                      of                      , in the County  
of                      ,                      , died on or about the                      day of  
A.D. 19                      , at the                      of                      in the County of  
                    , and had at the time of his death his fixed place of abode  
at the                      of                      , in the County of                      . That the  
said deceased died a widower leaving E. F. and G. F., his  
natural and lawful children, who both reside at the                      of  
                    in the County of                      . That the said E. F. is an  
infant of                      years of age, and the said G. F. is an infant  
of                      years of age. That the said C. F. died intestate (*or as the  
case may be*) and without having appointed a guardian of the  
said infants. That the value of the property of the said

deceased, which he in any way died possessed of or entitled to, and to which the said infants are entitled, is about           dollars and under           dollars; that the value of the personal estate to which the said infants are so entitled, is about           dollars and under           dollars, and of the real estate to which they are so entitled is about           dollars and under           dollars, and that the annual value of the said real estate is about           dollars and under           dollars, and that full particulars of both said personal estate and of said real estate and an appraisement thereof are exhibited herewith and are verified upon oath.

That due notice has been given of your petitioner's intention to apply to be appointed guardian, and that the petitioner is the *natural uncle* and one of the next of kin of the said infants.

Therefore your petitioner prays that *he* may be appointed guardian of the persons and estates of the said infants, E.F. and G.F., and that the letters of guardianship may be granted to *him* by this Honourable Court, pursuant to the statute in that behalf.

Dated at,       etc., the           day of           , A.D. 19   .  
A. B.

(Or if signed by solicitor, A. B., by his solicitor, J. P.)

2. *Affidavit verifying facts set forth in petition for Letters of Guardianship.*

In the Surrogate Court of the County of

In the matter of the guardianship of the infant children of C. F., I, A. B., of the           of           , in the County of           , make oath and say:

1. That I am the petitioner named and described in the said petition.

2. That the various facts, matters and things in the said petition contained and set forth are true in substance and in

fact to the best of my knowledge and belief and so far as I have been enabled to ascertain them.

Sworn before me the                    day of                    , 19    . } A. B.  
at the                    of                    in the County of                    }

*Persons authorized to administer oaths under the Act.*

NOTE.—Besides the foregoing affidavit there must be furnished the proof required by Rule 2.

### 3. Oath for Guardian.

In the Surrogate Court of the County of

In the matter of the guardianship of the infant child (or children) of C. F., deceased.

I, A. B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, make oath and say:

That I am the person applying to be appointed the guardian of E. F., the infant child (*or as the case may be*) of C. F., deceased, in his lifetime of the                      of                      , in the County of                      ,                      , who died on or about the day of                      , 19                      ; that I will, if I am appointed such guardian, faithfully perform the trust of guardianship, and that I will, when my said ward becomes of the full age of twenty-one years, or whenever the said guardianship is determined, or sooner if thereto required by the said Surrogate Court or by the Judge thereof, render to my said ward, or to *his* executors or administrators, a just and full account of all goods, moneys, interest, rents, profits, property or other estate of my said ward—which shall have come into my hands, or possession or under my control, and will thereupon without delay deliver and pay over to my said ward—or to *his* executors or administrators the estate or the sum or balance of money, which may be in my hands or possession or under my control, belonging to my said ward—deducting therefrom and retaining such reasonable sum for my

expenses and charges as shall upon an audit of my accounts be allowed by the Court or the Judge.

Sworn before me at the                      of                      ,  
                     in the County of                      , the                      }                      A.B.  
                     day of                      , 19                      .

*Person authorized to administer oaths under the Act.*

(See R.S.O. 1897, cap. 168, sec. 13.)

#### 4. Bond to be given by Guardians.

Known all men by these presents, that we, A. B., of the  
                     of                      in the County of                      ,                      , K. L., of  
 the                      of                      in the County of                      , and M. N.,  
 of the                      ,                      of                      in the County of                      ,  
                     , are held and firmly bound unto E. F. and G. F., of  
 the                      of                      in the County of                      the infant  
 children of C. F., late of the                      of                      in the County  
 of                      ,                      , deceased, and to each and every of  
 them in the sum of                      dollars, to be paid to the said E. F.  
 and F. G., their and each of their executors, administrators and  
 assigns, for which payment to be well and truly made, we do  
 bind ourselves and each and every of us, our and every of our  
 executors and administrators firmly by these presents; Sealed  
 with our seals. Dated the                      day of                      in the year  
 of our Lord 19                      .

Whereas, the said A. B. being appointed guardian of the  
 persons and estate of the said infants by the Surrogate Court of  
 the County of                      according to the Statute in that behalf,  
 is required to give security for the performance of the said  
 trust.

Now the condition of this obligation is such, that if the above  
 bounden A. B. shall faithfully perform the said trust, and *he*  
 or *his* executors or administrators shall, when the said wards  
 respectively become of the full age of twenty-one years, or



whenever the said guardianship shall be or is determined, or sooner if thereunto required by the said Surrogate Court, render to each of the said wards or to their respective executors or administrators, a just and full account of all goods, moneys, interest, rents, profits, property or other estate of such wards, which shall have come into the hands or possession or under the control of the said A. B., and shall thereupon exhibit under oath and render in to the said Court for audit and allowance, a just and full account of *his* guardianship, and shall thereupon, without delay, deliver and pay over to each and every of the said wards or to *his* or their executors or administrators, the estate or the sum or balance of money which may be in the hands or possession or under the control of *him* the said A. B., belonging to the said ward or wards, deducting therefrom and retaining such reasonable sum for the expenses and charges of *him*, the said A.B., as such guardian as by the said Court or by the Judge thereof shall have been allowed, then this obligation to be void, or else to remain in full force and virtue.

Signed, sealed and delivered	}	A. B. [L.S.]
In the presence of		K. L. [L.S.]
		M. N. [L.S.]

5. *Affidavit of Justification by Sureties.*

In the Surrogate Court of the County of

In the matter of the guardianship of the infant child (*or* children) of A. B., deceased.

We, K. L., of the                      of                      in the County of                      ,  
                     , and M. N., of the                      of                      in the County  
 of                      ,                      , severally make oath and say: that we are  
 the proposed sureties on behalf of the intended guardian of the  
 infant child (*or* children) of A. B., deceased, in the within (*or*  
 annexed) bond named, for the faithful performance of the trust  
 of guardianship to *him* to be committed; and I, the said K. L.,  
 for myself, make oath and say: that I reside at                      , in the

County of \_\_\_\_\_, and am worth property to the amount of \_\_\_\_\_ dollars, over and above all encumbrances and over and above what will pay my just debts and every other sum for which I am now bail or for which I am liable as surety, or endorser, or otherwise; and I, the said M. N., for myself make oath and say: that I reside at \_\_\_\_\_, in the County of \_\_\_\_\_, and am worth property to the amount of \_\_\_\_\_ dollars, over and above all encumbrances and over and above what will pay my just debts and every other sum for which I am now bail or for which I am liable as surety, or endorser, or otherwise.

The above named K. L. and M. N. were	}	
severally sworn before me the		K. L.
day of _____, 19____, at the		M. N.
of _____ in the County of		

*Person authorized to administer oaths under the Act.*

6. *Notice to be Transmitted to the Registrar of a Surrogate Court to the Surrogate Clerk, of application for Letters of Guardianship by one of the next of kin of infant children of deceased widower, or as the case may be.*

In the Surrogate Court of the County of \_\_\_\_\_

To the Surrogate Clerk:

Take notice that application has been made to the Surrogate Court of the County of \_\_\_\_\_, by A. B., of, etc., to be appointed guardian to E. F. and G. F., who reside at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, infant children of C. F., late of, etc., who died a widower (*or as the case may be*), and without appointing any guardian of the said infants, the said A.B., being the maternal uncle (*or as the case may be*) of the said infants.

Application received the _____ day of _____, 19____.	}	
This notice mailed the day _____		.....
of _____, 19____.		<i>Registrar of the said Court.</i>

7. *Letters of Guardianship.*

CANADA :  
Province of Ontario. }

In Her Majesty's Surrogate Court of the County of

Whereas A. B., of, etc., by petition to the said Court, did set forth C.F., late of, etc. (*recite as in petition*), and prayed that *he* might be appointed guardian of the persons and estates of the said infants, pursuant to the Statute in that behalf, and that Letters of Guardianship might be granted to *him* by the said Court.

Be it known that on the            day of            , A.D. 19    , the said A. B. was appointed guardian of the persons and estate of them the said E. F., and G. F., and these Letters of Guardianship are accordingly granted by the said Court to the said A. B., with power and authority to *him* to do all such acts, matters and things as a guardian may or ought to do, under and by virtue of any Act of the Legislature of Ontario, relating to minors and their property, *he*, the said A. B., having been duly sworn to faithfully perform the trust of guardianship, and that *he* will when *his* said wards respectively become of the full age of twenty-one years, or whenever the said guardianship is determined, or sooner if thereto required by the said Surrogate Court or by the Judge thereof, render to *his* said wards, or to their executors or administrators, a just and full account of all goods, moneys, interest, rents, profits, property, or other estate of *his* said wards, which shall have come into *his* hands or possession or under *his* control, and will thereupon without delay deliver and pay over to *his* said wards or to their executors and administrators the estate or the sum or balance of money which may be in *his* possession or under *his* control belonging to *his* wards, deducting therefrom and retaining such reasonable sum for *his* expenses and charges as shall upon an audit of *his* accounts be allowed by the Court or the Judge.

[L.S.]

.....

*Registrar.*

## SURROGATE COURT, COUNTY OF

8. *Guardian Book.*

No. of Appli- cation.	Name of Father of Minors, and place of residence at the time of his decease.	Names and places of re- sidence of Minors.	When Applica- tion re- ceived.	Name, Resi- dence, and Addition of Applicant.	When notice of Surrogate Clerk mailed.	When certificate from the Surrogate Clerk received.	Nature of matter certified.	Note of order or direc- tion by Judge—of let- ters of Guardianship, if granted, and of other proceedings had

## FOR THE SURROGATE CLERK'S OFFICE.

9. *Guardian Book.*

Name of Father of Minors, and residence at time of his decease.	Names and places of Residence of Minors.	When Notice re- ceived.	From what Surrogate Court.	Name Residence and Addition of Applicant.	When Certificate to Registrar of Surrogate Court mailed.	Nature of matter certified.



## I.

## REGISTRARS' FEES—NON-CONTENTIOUS BUSINESS.

The following shall be the tariff of fees to be taken by the Registrars of the Surrogate Court for duties and services in respect of non-contentious business in the said Court:

1. For services rendered under sections 67 and 68 of the Act (a) (see Rule 46), where the value of the property does not exceed \$400. ....	\$1 50
2. Receiving and examining papers and entering application. ....	1 00
3. Every necessary notice to Surrogate Clerk. ....	25
4. Receiving and entering certificate. ....	25
5. Recording every bond with affidavits of justification and execution. ....	1 00
6. (a) On every grant of letters probate or letters of administration where the property devolving is under \$1,000. ....	1 00
(b) \$1,000 and under \$4,000. ....	2 00
(c) \$4,000 and under \$10,000. ....	3 00
(d) \$10,000 and under \$20,000. ....	4 00
(e) \$20,000 and upwards. ....	5 00
7. Submitting papers with Registrar's report thereon to Judge to lead grant. ....	50
8. Recording grants or other instruments under Rule 46, or letters of guardianship, per folio. ....	10
9. For preparing probate or letters of administration or of guardianship issued under Seal of the Court, each instrument. ....	75
10. Ditto.—If grant is special. ....	1 00
11. Transcript of will, per folio. ....	10
12. Certified copy of will in addition, per folio. ....	10
13. Drawing special orders or other papers directed by Judge, per folio. ....	10

(a). Now Secs. 74 and 75 of R.S.O. 1897 cap. 59.

14. Taking every affidavit or administering oath to a witness . . . . .	20
15. Attending and entering every order or minute . . . . .	50
16. Every summons or order, and every instrument or other process under seal, not otherwise provided for if prepared by the Registrar, per folio, including fee for sealing . . . . .	20
17. For looking up original will or instrument and inspection, or for general search into proceedings . . . . .	30
18. Every other search . . . . .	20
19. Every necessary certificate granted by Registrar . . . . .	50
20. Exemplification under seal . . . . .	1 00
If exceeding 5 folios, per folio on the excess . . . . .	10
21. For depositing every will of a living person for safe custody, including a deposit receipt . . . . .	50
22. Issuing every subpœna . . . . .	50
23. Writing every necessary letter . . . . .	25
24. Filing every necessary paper . . . . .	10
25. Attending audit, including filing necessary papers thereat . . . . .	50
26. For taxing costs and granting certificate . . . . .	50
27. Receiving, entering and filing caveat . . . . .	50
28. Warning to caveat and entering the same . . . . .	30
29. Postage and stamps and all other necessary disbursements to be added in all cases.	

(No fee allowed for filing papers in non-contentious business before probate or letters granted.)

On proof of Will in Solemn Form, and in proceedings for revoking probate, or letters of administration, or for the removal of a guardian:—

1. If the proceedings are disputed or contentious the same fees may be charged by the Registrar as in contentious proceedings.
2. If the proceedings are undisputed the same charges may be made by him as in non-contentious proceedings.

## II.

## REGISTRARS' FEES,—CONTENTIOUS BUSINESS.

1. Receiving, entering, and filing caveat, and transmitting notice thereof to Surrogate Clerk.....	\$ 75
2. Warning to caveat, and entering same.....	30
3. Receiving, entering and filing bond on appeal.....	25
4. Searching for, making up and transmitting papers to Court of Appeal or High Court of Justice.....	50
5. Every certificate for which no other fee is payable..	50
6. On every citation, summons or Judge's order.....	50
7. Search in Registrar's books or files.....	20
8. Looking up original will or instrument, and inspection, or for general search into proceedings.....	30
9. Filing every necessary paper.....	10
10. Filing and entering every paper required to be minuted. . . . .	10
11. Entering every record or issue deposited for trial...	50
12. Every subpœnea. . . . .	50
13. Administering oath or taking an affidavit.....	20
14. Entering decree, or order in pursuance of judgment, if under five folios. . . . .	50
15. If over five folios, per folio.....	10
16. Entering every order or decree requiring to be entered in the Court book, not otherwise specified, per folio.	10
17. Issuing every Writ under Seal of the Court, except subpœna. . . . .	50
18. For every office copy or extract of a minute, order, decree, or other document filed or deposited in the office of the Registrar, per folio.....	10
19. For the seal, in addition to the fee for the copy, and collating, if required. . . . .	25
20. Every necessary letter . . . . .	25
21. Taxing every bill of costs, and granting certificate..	80

## DISBURSEMENTS.

22. All outlays for postages and stamps as disbursed to be added in all cases.
23. After contentious proceedings are closed and a decree for probate granted, or letters of administration have been decreed to either party, the Registrar in addition to the foregoing fees, shall be entitled to receive for business done the like fees as in non-contentious cases.

On proof of Will in Solemn Form and in proceedings for revoking probate, or letters of administration, or for the removal of a guardian.

1. If the proceedings are disputed or contentious the same fees may be charged by the Registrar as in contentious proceedings.
2. If the proceedings are undisputed the same fees may be charged by him as in non-contentious proceedings.

## III.

## FEES AND COSTS TO SOLICITORS AND COUNSEL.

The following shall be the tariff of fees and costs to be allowed in respect of proceedings in the Surrogate Courts, in non-contentious cases, to Solicitors and Counsel practising therein, viz.:

1. Drawing all necessary papers and proofs to lead grant and obtaining order for probate, or letters of administration, in ordinary cases and taking out same
  - (a) When the value of the property devolving is under \$1,000. . . . . \$ 6 00
  - (b) \$1,000 and under \$4,000. . . . . 8 00
  - (c) \$4,000 and under \$10,000. . . . . 12 00
  - (d) \$10,000 and under \$20,000. . . . . 20 00
  - (e) \$20,000 and upwards . . . . . 30 00

2. In cases of temporary administration, or administration granted pending any suit touching the validity of a will, or for obtaining, recalling or revoking any probate or grant of administration..... 10 00  
(May be increased, in discretion of Judge, in cases of a special or important nature to a sum not exceeding \$20,00.)
3. For obtaining letters of guardianship a fee of ten dollars (\$10.00) in addition to all necessary disbursements may be allowed, to be increased, in the discretion of the Judge, in cases of a special or important nature, to a sum not exceeding twenty dollars (\$20.00).

#### AUDIT AND PASSING ACCOUNTS OF EXECUTOR OR ADMINISTRATOR.

Where the inventory and accounts are brought in voluntarily and the next of kin or legatees, or devisees, or creditors do not appear, or appearing, there are no contentious proceedings or dispute about accounts.

4. Taking instructions .....	\$ 2 00
5. Preparing and bringing in accounts if less then ten folios. ....	3 00
6. If exceeding ten folios, per folio above ten.....	20
7. Each necessary copy per folio.....	10
8. Affidavit verifying same .....	1 00
9. Attending to get sworn to.....	50
10. Attending to file same, and petition.....	25
11. Petition and taking out appointment for consideration thereof. ....	2 00
12. Each necessary copy of petition and of appointment, per folio. ....	10
13. Attending to serve such persons as the Judge shall direct, each. ....	25
14. Affidavit of service, including attendance and paid commissioner. ....	50



15. Attending the audit, and exhibiting accounts and vouchers, and numbering same.....	\$5 00
16. If engaged more than two hours, for each subsequent hour necessarily engaged.....	2 00
17. Drawing up order for allowance to executor or administrator, and order for the passing of the accounts and engrossing, including copies.....	1 00
18. Bill of costs and copy.....	50
19. Attending taxation. ....	50

Where the accounts are brought in by citation, or Judge's order, and the proceedings are compulsory, or contentious, or where there are disputed accounts:—

20. For citation or order and serving same, and subsequent proceedings taken thereupon by the solicitor and counsel, where counsel properly attend, the same fees may be charged and allowed in taxation in all respects as in case of contentious proceedings.
21. To the solicitor of the executor, or administrator cited and to his counsel, where counsel properly attend, the same fees may be charged and allowed in taxation, as in the case of contentious proceedings.
22. For preparing accounts and bringing in the same and all subsequent proceedings up to passing accounts and order granting allowance to executor, or administrator (when taken or made), the same fees may be charged and allowed in taxation as the foregoing items 4 to 19 inclusive, respectively, when applicable.
23. For taking out subpœna, and making copies, and getting the same served (when necessary) the same fees may be charged and allowed at taxation as for similar services rendered in contentious proceedings.

For proof of will in solemn form and attending the same on behalf of those interested, or cited to appear; in proceedings for revoking probate, or letters of adminis-

tration, or for the removal of a guardian; and for intervening in behalf of an heir-at-law or other interested party.

24. If the proceedings are disputed, the same or similar fees and costs may be charged and allowed on taxation as in contentious cases, according to their special importance.

For allowance to sheriffs and witnesses and other disbursements see *post*.

#### IV.

##### IN CONTENTIOUS BUSINESS.

The following shall be the tariff of fees and costs to be allowed in respect of proceedings in the Surrogate Courts in contentious cases to solicitors and counsel practising therein, viz. :—

##### INSTRUCTIONS.

1. For caveat, or warning of caveat, for revoking probate or letters of administration, or for the removal of a guardian.....\$ 3 00
2. For new letters of guardianship..... 1 00
3. For proof of will in solemn form..... 1 00
4. For statement of claim or other pleading..... 1 00
5. For citation, summons, or Judge's order..... 1 00
6. For interrogatories. . . . . 1 00
7. For special affidavits, in discretion of Judge..... 75
8. For inventories, or bringing in accounts..... 1 00
9. To defend suit, or to appear on behalf of any interested party. . . . . 2 00
10. For brief on case for hearing..... 1 00

##### DRAWING INSTRUMENTS, INTERROGATORIES, ETC.

11. Preparing caveat, or warning to caveat, and attending and entering either. . . . . 1 00
12. Interrogatories, per folio. . . . . 20

13. Renunciation of probate; attending and filing . . . . .	\$ 75
14. Any instrument or necessary paper, for which a fee is not otherwise allowed, per folio . . . . .	20
15. Preparing every citation, summons or order, includ- ing præcipe and attendance, if drafted by solicitor. . . . .	1 00
16. Preparing and entering appearance to citation, or to the warning of caveat. . . . .	50
17. Other common appearance, and filing when necessary. . . . .	25
18. Drawing and engrossing statement of claim, or other pleading, 10 folios or under. . . . .	2 00
19. If exceeding 10 folios, for every additional folio . . .	20

ATTENDANCES.

20. Every special attendance in Chambers in the course of a cause. . . . .	1 00
(To be increased in the discretion of the Judge, not to exceed). . . . .	3 00
21. Common and necessary attendances when not in- cluded in some other provision or fee. . . . .	25

NOTICES.

22. All necessary notices, if five folios or under, inclu- sive of copy. . . . .	50
23. If necessarily exceeding five folios, for every addi- tional folio. . . . .	10

DECREE, ETC.

24. Drawing decree or order for probate, or grant of let- ters of administration, or of guardianship, or for recalling or revoking probate, or grant of letters, or for removal of a guardian, or other special de- cree or order, if prepared by the solicitor, per folio. . . . .	20
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DRAWING AFFIDAVITS.

25. Of service or other common affidavit, including at- tendance and paid commissioner. . . . .	75
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26. Necessary special affidavits, not exceeding five folios.	\$1 00
27. If necessarily above five folios, per folio.....	20
28. For copy of a caveat, warning, citation, statement of claim, or other pleading, or necessary paper or document, when not otherwise provided for, per folio. ....	10
29. Fee on every subpœna. ....	75
30. For every copy of subpœna.....	20
31. Drawing issue or copy of pleadings, if 10 folios or under. ....	1 00
32. If exceeding 10 folios, per folio.....	10
33. For perusing testamentary papers, and other docu- ments, including attendance when necessary, in the opinion of the Registrar, per folio, 3 cents (not to exceed \$1.00).....	03
34. Fee on every decree, order or judgment signed by the Judge. ....	50

## COUNSEL FEES.

35. On motion of course, or motion for order nisi, or mo- tion to make absolute, in matters not special.....	1 00
36. On special motion, and on special application to the Court or Judge (only one counsel fee to be taxed). ....	3 00
To be increased in the discretion of the Judge to a sum not to exceed. ....	6 00
37. On argument in supporting or opposing application to the Court or Judge, argument of demurrer, or special case. ....	5 00
To be increased in the discretion of the Judge to a sum not exceeding. ....	10 00
38. Fee with brief at trial. ....	10 00
To be increased by the Judge at his discretion in cases of a special or important nature, and on notice to the opposite party, to a sum not exceeding \$25 (no charge to be made by either party in connec- tion with such application).	

39. Fee to counsel (when counsel attend) on argument or on examination in Chambers, where, in the opinion of the Judge, the attendance of a counsel is required . . . . . \$2 00
- To be increased (in the discretion of the Judge) to a sum not exceeding. . . . . 5 00
40. On settling pleadings, interrogatories, special case or petition, or advising on evidence, in the discretion of the Judge, not exceeding. . . . . 3 00

## JUDGMENTS OR DECREES.

41. Drawing minute of judgment, order or decree, per folio, when prepared by solicitor under direction of the Judge. . . . . 20
42. For every hour's attendance before Judge on settling minutes. . . . . 1 00

## LETTERS.

43. Common letters necessary in the course of the cause, including agency letters. . . . . 25

## BILL OF COSTS.

44. Drawing bill of costs for taxation, including engrossing and copy for Registrar, per folio. . . . . 20

## MISCELLANEOUS.

45. At the close of contentious proceedings, and on decree for probate or grant, the fees to the solicitor for taking out probate, or letters of administration, or of guardianship, shall be the same as is provided for by the tariff for non-contentious business.
46. Where it has been proved to the satisfaction of the Judge that proceedings have been taken by solicitors out of



Court to expedite proceedings, save costs, or compromise actions or disputes, an allowance is to be made therefor in the discretion of the Judge. This shall apply whether the proceedings are contentious or non-contentious. (See item 145 of Tariff Con. Rules of Prac.)

#### DISBURSEMENTS.

47. The fees paid to the Registrar or other officer of the Court, together with Court fees, stamps and postage, to be added to the solicitor's bill in all cases, whether contentious or non-contentious.
48. In cases in which the person to be cited or served cannot be served in Ontario, or in which he shall avoid service, or the service shall necessarily be effected beyond the jurisdiction, or by publication, such a sum is to be allowed for service as the Judge may consider reasonable under the circumstances, together with disbursements for publication of citation, etc., when necessary.

#### SHERIFFS.

Sheriffs shall be entitled to receive the same fees as are allowed for like services in the County Court.

#### WITNESSES.

There shall be allowed to witnesses the same fees and conduct money or travelling expenses as are taxable in the County Courts.

[*Note*.—These tariffs are provided in lieu of, and not in addition to any previously existing tariff, applicable to and heretofore allowed to solicitors and counsel, in respect of proceedings in the said Surrogate Courts for contentious and non-contentious business.]

Framed and approved under the Acts of the Legislature of

Ontario, 53 Vict. ch. 17, sec. 13, and sec. 78 of the Surrogate Courts Act, R.S.O. 1887.

Signed JOHN H. HAGARTY, C.J.O.  
 J. A. BOYD, C.  
 THOMAS GALT, C.J., C.P.D.  
 F. OSLER, J.A.  
 JAMES MACLENNAN, J.A.  
 THOMAS FERGUSON, J.  
 JOHN E. ROSE, J.  
 THOMAS ROBERTSON, J.  
 W. G. FALCONBRIDGE, J.  
 HUGH MACMAHON, J.

# PROVINCE OF MANITOBA.

## RULES AND ORDERS.

UNDER "THE SURROGATE COURTS ACT."

*Order-in-Council No. 10449, dated January 6, 1906.*

That the rules and orders hereto annexed, made by the Judges of the Surrogate Courts of Manitoba as the general rules and orders of the Surrogate Courts of the Province of Manitoba, have been approved:—

### *Rules.*

In pursuance of the provisions of sections 29 and 30 of chapter 41 of the Revised Statutes of Manitoba, 1902, "The Surrogate Courts Act," as amended by ch. 4 of 4 Edw. VII., we, the Judges of the Surrogate Courts, do make, subject to the approval of the Lieutenant-Governor-in-Council, the following rules and orders, to take effect as the general rules and orders of the Surrogate Courts on and after the first day of February, 1906:—

### *Interpretation.*

1. In these rules, unless the context requires otherwise:—

(a) Expressions shall have the same meaning as they would have if the rules were a part of the Surrogate Courts Act;

(b) The expression "application" and "grant" shall mean respectively an application for and a grant of letters probate, letters of administration or letters of administration with the will annexed, and shall include re-sealing;

(c) The expression "proofs to lead grant" or "proofs" shall mean the affidavits in support of an application, and shall include the usual oath of an executor or administrator;

(d) The expression "solicitor" shall mean a solicitor within the terms of the Law Society Act;

(e) The expression "Act" shall mean the Surrogate Courts Act.

*General Provisions.*

2. All practice inconsistent with these rules is hereby superseded.

3. As to matters not provided for in these rules, the practice shall be regulated by analogy thereto as near as may be. In any matters not provided for, where the practice cannot be regulated by such analogy, it shall be regulated by analogy to the rules of the Court of King's Bench. In any particular case not covered by the foregoing the Judge may direct the course to be pursued.

4. Subject to section 27 of the Act a Judge shall have power to sit and act at any time for the transaction of any part of the business of the Court of which he is a Judge.

*Non-contentious Business.*

5. Non-contentious business shall include all common form business as defined by section 2(d) of the Act.

*Applications, Proofs and Grants.*

6. Every application shall be by petition, signed and presented by the applicant or his solicitor.

7. The petition shall set forth, and the proofs to lead grant shall verify, all the facts upon which the applicant relies for a grant.

8. When the applicant is not the person primarily entitled to the grant, the petition and proofs shall shew that every person entitled in priority has consented or renounced, or shall set out fully the special grounds on which the applicant seeks the grant, notwithstanding his want of priority.

9. Where a grant is applied for by one or some only of the next of kin, there being another or others equally entitled thereto, the applicant may be required to give notice of the application to such others next of kin.

10. The proofs are to shew that the applicant is twenty-one years of age, and where there is a will, that the testator was twenty-one years of age when the will was made.

11. The usual oath of an executor or administrator shall be reduced to writing and subscribed and sworn to by the applicant as an affidavit.

12. The proofs may be embodied in one affidavit.

13. If there should appear to be any material variance between the application and the proofs, the Judge may direct the application to be amended according to the fact and a new notice of the amended application to be sent to the Surrogate Registrar.

14. The affidavit of intestacy must shew that search for a will has been made in all places where the deceased person usually kept his papers and in his depositories. This affidavit is to be made by the applicant if possible, but in any event there should be an affidavit from the person in the best position to know of a will, if there were one.

15. The due execution of the will shall be proved by one of the witnesses, or the absence of the witnesses accounted for, in which last case the will must be established by other proof to the satisfaction of the Judge.

16. Every will, in respect of which a grant is sought, shall be marked so as to identify it by the applicant, and also by the person before whom the affidavit of execution is sworn. When the will consists of more than one page, and each page is not identified by the signature or initials of the testator or witnesses, the Judge may call for proof that the will sought to be proved consists of the same pages as when executed by the testator.

17. An affidavit of "plight" need not usually be furnished, but the Judge may call for such an affidavit where anything pe-



culiar in the appearance or condition of the will, or in the circumstances under which it is propounded, makes it seem desirable that it should be clearly traced from the possession of the testator in his lifetime up to the time of the making of the application.

18. In the affidavit of value the property is to be valued at its fair market value on reasonable conditions. If the valuation is not satisfactory to the Judge, and if the applicant, after notice to him, fails to make it satisfactory, the Judge may procure some competent and disinterested person to make a valuation, and such person's remuneration shall be payable by the applicant to the Clerk of the Court before the issue of the grant.

19. Every affidavit shall be drawn up in the first person, stating the full name of the deponent at the commencement, and his description and true place of abode, and shall be signed by him.

20. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

21. When an affidavit is made by any person who is blind, or who, from his signature or otherwise, appears to be illiterate, the officer before whom the same is sworn is to state in the jurat that the affidavit was read in his presence to the deponent and that the deponent seemed perfectly to understand it, and made his mark or wrote his signature in officer's presence. No such affidavit shall be used in evidence in the absence of this statement, unless the Judge is otherwise satisfied that the affidavit was read over to and apparently perfectly understood by the deponent.

22. No affidavit, having in the jurat or body thereof any interlineation, alteration or erasure, is to be read as evidence unless the interlineation, alteration or erasure is authenticated by the initials of the officer before whom the affidavit was sworn.

23. Unless under special circumstances, no affidavit, which has been sworn before the party on whose behalf it is offered, or before his solicitor, or the clerk or partner of such solicitor, is to be accepted.

24. Where interlineations, alterations or erasures appear in a will it must be clearly shewn that they existed in the will at the time of its execution.

25. If a testator was blind or illiterate the proofs shall shew that before its execution the will was read over to him or that he had knowledge of its contents.

26. Unless under very special circumstances no letters of administration shall issue until after the lapse of fourteen days, and no letters probate or letters of administration with the will annexed until after the lapse of seven days from the death of the deceased person.

27. No person entitled to a general grant is to be permitted to take a limited grant.

28. The grant is to shew on its face how interests, prior to that of the applicant, have been cleared off.

29. A grant may be made to a guardian of a person under the age of twenty-one years for his use and benefit during his minority. Where there is no testamentary guardian or guardian appointed by a Surrogate Court, a guardian for this purpose may be assigned to the minor by the Judge, but, where the minor is over fourteen years of age, only with his consent.

30. When, pursuant to the Act, a Judge shall take effects of a deceased person into his hands for safe-keeping or administration, notice of such fact shall at once be sent to the Surrogate Registrar, who shall file the same as an ordinary notice of application, and thereafter no grant shall issue out of any Surrogate Court in respect of the estate without notice to such Judge.

#### *Bonds.*

31. The bond to be given upon any grant shall be according to the forms subjoined or in a form as near thereto as the circumstances of the case admit. It shall be written, or partly written and partly printed, but not type-written, and shall be prepared with special care.

32. The sureties in a bond shall justify to amounts which in the aggregate shall equal the amount of the penalty of the bond, and the justification shall be over and above all debts, all statutory exemptions from seizure under execution and any other sums for which the parties are already surety.

33. Except when for special reasons the Judge shall otherwise direct, there shall be at least two sureties, and the amount of the penalty shall be double the value of the property to be dealt with under the administration.

34. When re-sealing of a foreign grant is applied for, and a certificate from the foreign Court is relied on to shew that security was given there in a sum sufficient to cover the assets in Manitoba, such certificate must state the amount at which the Manitoba assets were valued in the foreign Court.

#### *Caveats.*

35. Any person intending to oppose the issue of a grant may personally, or by his solicitor, enter a caveat either in the office of a Surrogate Clerk or in that of the Surrogate Registrar.

36. The caveat is to shew the nature of the caveator's interest in the estate of the deceased and the grounds on which the caveat is entered, and where entered by the caveator personally it must give his post office address.

37. Accompanying the caveat there must be an affidavit or statutory declaration by the caveator, or some one on his behalf who is acquainted with the facts, verifying the grounds on which the caveat is entered and shewing that it is not entered for the purpose of delaying or embarrassing any person interested in the estate.

38. A caveat shall remain in force for three months and then expire, unless the time is extended, as it may be by a Judge's order.

39. Notwithstanding the filing of a caveat an application may be made by any person claiming to be entitled to a grant, and the

usual notice thereof sent to the Registrar, but no further proceedings shall be taken upon such application until the caveat has expired or been discharged or withdrawn.

40. The practice of warning caveats is superseded.

41. Any person, whose application for a grant is affected by a caveat, may apply to the Judge to have the caveat discharged, and the procedure on such application shall be that prescribed in Rules 52 and 53.

42. Where the caveat is entered by the caveator personally, service of any summons, notice or other proceedings may be made upon him by mailing it to him at the address given in the caveat.

43. No caveat shall affect any grant sealed before notice of the filing of the caveat is received at the office of the Surrogate Court from which the grant issues.

44. Where the caveat has lapsed, or has been withdrawn or discharged, no further caveat in respect of the same subject matter shall be permitted to be filed without leave of the Judge.

#### *Citations.*

45. In all cases in which it has been heretofore necessary or customary to issue a citation to accept or refuse a grant, or to issue a subpoena to bring in a testamentary paper, and in all similar cases, a Judge's summons or order shall have the same effect as such citation or subpoena formerly had.

#### *Substituted Service.*

46. If it be made to appear to the Judge that personal service of any notice, summons or other proceeding, whether in a contentious or non-contentious matter, cannot be effected, or that such service would be attended with great expense or inconvenience, the Judge may make such order for substituted or other service as may seem just, and the service so effected shall be good service.

*Administration Accounts.*

47. Executors and administrators may voluntarily exhibit an inventory of the property of the deceased and render an account of their executorship or administration, or they may be called upon to do so on the application of any person interested in the estate by order of the Judge, and the practice in contentious cases shall apply, as far as necessary, to such an application.

48. The inventory and accounts shall be filed with the Clerk of the Court, and thereupon the Judge shall, on application to him in Chambers, fix a time and place for an audit, and give directions as to the persons to be served with notice thereof.

49. The audit shall be before the Judge in Chambers, and in the conduct of the same the rules of practice and procedure which govern in the offices of the Local Masters of the Court of King's Bench, under an order of reference, so far as such rules can be made to apply, shall be adopted, and the scale of fees shall be the same.

*Deposit of Wills in Clerk's Office.*

50. A will deposited for safe-keeping in the office of the Clerk of a Surrogate Court shall not during the lifetime of the testator be removed therefrom or copied or inspected, except by the testator in person, unless a written order from the Judge is first obtained and filed.

*Contentious Business.*

51. All proceedings in the Surrogate Courts, in respect of business not included under the expression "common form business," as defined in section 2(d) of the Act, shall be deemed to be contentious business. The expression shall be taken to apply to every case where there are conflicting claims as to the right to obtain or retain a grant, and where proceedings in respect of such claims are taken by one party against another.

52. All contentious matters shall be begun by way of summons or notice of motion before the Judge in Chambers. On the



return of the summons or notice the Judge may hear the matter in a summary way on the affidavits filed, or on *viva voce* testimony, or he may direct an issue to be tried before a Judge of any County Court in Manitoba, either with or without a jury, for the purpose of ascertaining any facts in dispute. Upon the order directing the issue being filed in the County Court the issue shall proceed to trial as if it were an ordinary cause in the said Court.

53. Upon such summary hearing, or upon the trial of the issue, as the case may be, the Judge may make an order disposing of the matter involved, and may make such order as to costs as he may deem proper, and such order shall be a final disposition of the matter, subject only to appeal under section 98 of the Act.

54. Any order providing for the payment of costs may be filed by the party to whom the costs are payable in any County Court in Manitoba, and thereupon the same proceedings may be taken upon it for the recovery of such costs as may be taken upon a judgment in the said County Court.

55. Any party to contentious proceedings may be ordered to give security in such an amount as the Judge may order for the other party's costs, where he is a person who would be compellable to give security for costs if he were a party to an action in the Court of King's Bench. In every such case the King's Bench procedure for obtaining and enforcing the security shall be followed as nearly as may be.

#### *Proofs of Will in Solemn Form.*

56. When a will is voluntarily propounded for proof in solemn form the Judge shall, after examining the petition and proofs, fix a time and place for taking evidence in support of the will and grant a summons to see proceedings at such time and place. This summons is to be served upon all persons having or claiming to have an interest in the question of the validity of the will.

57. At the time and place fixed, the person propounding the

will shall produce for examination one or more of the witnesses to the will, and may give such further evidence of the validity as he may desire.

58. When any of the persons summoned attends and takes part, the proceedings, if they go beyond the cross-examination of the witnesses to the will, shall be continued and disposed of as provided for in Rules 52 and 53.

59. The same method of notifying parties and proving the will shall, as nearly as may be, be followed in a case where an executor is put upon proof of a will in solemn form, by compulsion.

60. A person who files a caveat, merely to insure a will being proved in solemn form, shall state in the caveat that he only desires to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, but shall be subject to liability in respect of costs in the discretion of the Judge.

### *Appeals.*

61. A person intending to appeal under section 98 of the Act shall, within the time limited in the said section,

(1) Give security to the respondent, by paying \$100 into the Surrogate Court from which the appeal is being taken, or by filing with the clerk a bond in \$200, with a surety or sureties to the satisfaction of the clerk, conditioned to effectually prosecute the appeal and to pay such costs, charges and expenses as shall be awarded against him;

(2) File with the clerk an affidavit shewing that the values of the lands, goods, chattels, rights and credits, to be affected by the order, sentence judgment, decree or determination being appealed from, exceeds \$300;

(3) Enter the appeal in the office of the prothonotary of the Court of King's Bench, and give notice thereof to the respondent, shewing clearly the grounds on which he is appealing.

62. When the preceding rule has been complied with, the appeal shall be held to be duly lodged, and the appellant shall be entitled to obtain an order staying proceedings in the Surrogate Court.

63. Subject to said section 98 and the foregoing rules, the procedure in relation to the entering of the appeal, and the hearing and disposing of the same, shall follow as closely as possible the procedure prescribed in the County Courts Act in respect of an appeal from the decision of a County Court Judge.

64. Upon it appearing that the appeal has been duly lodged, the Clerk of the Surrogate Court shall, upon the request of the appellant and at his expense, transmit to the prothonotary all documents and evidence (or a copy of the evidence) connected with the appeal on file or deposited in his office, and also the judgment or decision being appealed from, or a copy thereof.

*Forms.*

65. The subjoined forms are to be adopted and followed in the several Surrogate Courts as nearly as the circumstances of each case will allow.

66. Printed forms, intended for use in ordinary cases, are not to be used when, on account of special circumstances, excessive interlineations or erasures would require to be resorted to.

JOSEPH RYAN,  
D. M. WALKER,  
T. D. CUMBERLAND,  
CORBET LOCKE.

APPLICATION FOR ADMINISTRATION.

*Unto the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

The petition of A.B., of the                      of                      , in the Province of Manitoba, druggist, sheweth:—

That C.D., hardware merchant,                      deceased, died on the                      day of                      , A.D. 19                      , at the                      of                      , and that at the time of his death he had his fixed place of abode at the                      of                      in the said                      Judicial District. (*If deceased's fixed place of abode was outside of Manitoba, add: "But left property in the said                      Judicial District"*).

That the value of the whole estate and effects which the deceased in any way died possessed of or entitled to within Manitoba, is not more than \$                      , to the best of your petitioner's knowledge and belief.

That the deceased died without having made any will, codicil or testamentary paper whatever.

That the deceased died a bachelor (*or leaving a widow and children, as the case may be*).

That your petitioner is the                      of the deceased. (*If the petitioner is not the person primarily entitled to the grant, shew the special grounds on which his application is based.*)

Wherefore your petitioner prays that administration of the estate and effects of the deceased may be granted and committed to him by this honourable Court.

Dated the                      day of                      , AD. 19                      .

A. B.,

*or* A.B., by his Solicitor, E.F.

## APPLICATION FOR PROBATE.

*Unto the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

The petition of A.B., of the                      of                      , in the Province of Manitoba, druggist, sheweth: —

That C.D., hardware merchant,                      deceased, died on the                      day of                      , A.D. 19                      , at the                      of                      and that at the time of his death he had his fixed place of abode at the                      of                      in the said                      Judicial District. (*If deceased's fixed place of abode was outside of Manitoba, add: "But left property in the said                      Judicial District."*)

That the value of the whole estate and effects which the deceased in any way died possessed of or entitled to within Manitoba is not more than \$                      , to the best of your petitioner's knowledge and belief.

That the deceased in his lifetime duly made his last will and testament, bearing date the                      day of, A.D. 19                      , (and a codicil bearing date the                      day of                      , A.D. 19                      ).

That your petitioner is the executor named in the said will (*or codicil*).

That your petitioner prays that probate of the said will (and *codicil*) may be granted to him by this honourable Court.

Dated the                      day of                      , A.D. 19                      .

A.B.,

*or* A.B., by his Solicitor, E.F.

## APPLICATION FOR ADMINISTRATION WITH WILL ANNEXED.

*Unto the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

The petition of A.B., of the                      of                      , in the Province of Manitoba, druggist, sheweth:—



That C.D., hardware merchant, deceased, died on the day of , A.D. 19 , at the of and that at the time of his death he had his fixed place of abode at of in the said Judicial District. (*If deceased's fixed place of abode was outside of Manitoba, add: "But left property in the said Judicial District"*).

That the value of the whole estate and effects which the deceased in any way died possessed of or entitled to within Manitoba, is not more than \$ to the best of your petitioner's knowledge and belief.

That the deceased in his lifetime duly made his last will and testament, bearing date the day of , A.D. 19 , (and a codicil bearing date the day of , A.D. 19 ).

That no executor is named in the said will (*or* codicil) (*or* that G.H., the executor named in the said will, has duly renounced all right and title to the probate and execution of the same).

That your petitioner is the residuary legatee named in the said will (*or as the case may be*).

Wherefore your petitioner prays that administration of the estate and effects of the deceased with the said will (and codicil) annexed may be granted and committed to him by this honourable Court.

Dated the day of , A.D. 19 .  
A.B.,  
*or* A.B., by his Solicitor, E.F.

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AFFIDAVIT OF DEATH AND PLACE OF ABODE.

*In the Surrogate Court of the Judicial District of the Province of Manitoba.*

In the estate of C.D., deceased.

I (*name, residence and occupation to be given in full*), make oath and say as follows:—

1. I am the executor (*or one of the executors*) of the last will and testament of the said deceased (*or the person applying for administration of the estate and effects of the said deceased (or as the case may be)*).

2. The deceased died on the                      day of                      , A.D. 19    , at                      , and that at the time of his death he had his fixed place of abode at the                      of                      , in the said Judicial District. (*If deceased's fixed place of abode was outside of Manitoba, add: "But left property in the said Judicial District"*).

Sworn before me at                      ,  
in the Province of Manitoba,  
this                      day of                      ,  
A.D. 19    .

A Commissioner in B.R.

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#### AFFIDAVIT OF VALUE OF PROPERTY.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (*name, residence and occupation to be given in full*), make oath and say as follows:—

1. I am the executor (*or one of the executors*) of the last will and testament of the said deceased (*or the person applying for administration of the estate and effects of the said deceased (or as the case may be)*).

2. The fair market value of the whole estate and effects of the said deceased which he in any way died possessed of or entitled to, within Manitoba, if sold on reasonable terms of payment, is not more than \$                      , and full particulars and a

true appraisement of the said estate and effects are given below  
(*or in the paper writing marked as exhibit "A" to this affidavit*).

Sworn before me at \_\_\_\_\_ ,  
in the Province of Manitoba,  
this \_\_\_\_\_ day of \_\_\_\_\_ ,  
A.D. 19 \_\_\_\_\_ .

A Commissioner in B.R.

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AFFIDAVIT OF SEARCH FOR WILL.

*In the Surrogate Court of the \_\_\_\_\_ Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (*name, residence and occupation to be given in full*), make  
oath and say as follows:—

1. I am the person applying for administration of the estate  
and effects of the said deceased (*or as the case may be*).

2. I have made diligent and careful search in all places where  
the deceased usually kept his papers and in his depositories in  
order to ascertain whether he had or had not left any will, but  
that I have been unable to discover, and I verily believe that he  
died without leaving any will, codicil or testamentary paper  
whatever.

Sworn before me at \_\_\_\_\_ ,  
in the Province of Manitoba,  
this \_\_\_\_\_ day of \_\_\_\_\_ ,  
A.D. 19 \_\_\_\_\_ .

A Commissioner in B.R.

*Note.*—The affidavit of search for will should ordinarily be  
made by the person who has had the best opportunity of know-  
ing of the existence of a will, if there were one.

## AFFIDAVIT OF EXECUTION OF WILL.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (*name, residence and occupation to be given in full*), make oath and say as follows:—

1. I knew C.D.,                      late of the                      of                      , in the Province of Manitoba, the said deceased.

2. On the                      day of                      , A.D. 19                      , I was personally present and did see the paper writing, now shewn to me and marked as exhibit "A" to this affidavit, signed by the said C.D., as the same now appears, as and for his last will and testament, and the same was so signed by the said testator in the presence of me and of G.H., the other subscribing witness thereto, both of us being present at the same time, whereupon the said G.H. and I did, in the presence of the said testator, attest and subscribe the said will.

3. I verily believe that the testator at the time of the execution of the said will was of sound and perfect mind, memory and understanding.

Sworn before me at                      ,  
in the Province of Manitoba,  
this                      day of                      ,  
A.D. 19                      .

A Commissioner in B.R.

*Note.*—If there are erasures or interlineations in the will a clause should be added referring them with particularity and shewing that they were there at the time of the execution, and if the testator signed by making his mark or if another signed for him by his direction, should be shewn that the will was read over to him before execution and that he appeared fully to understand it.

OATH OF EXECUTOR.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (name, residence and occupation to be given in full), make oath and say as follows:—

1. I believe the paper writing now shewn to me and marked with the letter “A” to contain the true and original last will and testament of the said C.D.

2. At the time of the execution of the said will the said testator was of the full age of twenty-one years, and I am now of the full age of twenty-one years.

3. I am the executor (*or* one of the executors) named in the said will (*or* executor according to the tenor of the said will, *or as the case may be.*)

4. I will faithfully administer the estate and effects of the said testator by paying his just debts and the legacies contained in his will so far as the same will thereunto extend, and the law bind me, and by distributing the residue (if any) of the estate according to law, and I will exhibit under oath a true and perfect inventory of all and singular the estate and effects of the said testator and render a just and true account of my executorship when lawfully required to do so.

Sworn before me at                      ,  
in the Province of Manitoba,  
this                      day of                      ,  
A.D. 19   .

A Commissioner in B.R.



## OATH OF ADMINISTRATOR (WILL ANNEXED).

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (*name, residence and occupation to be given in full*), make oath and say as follows:—

1. I believe the paper writing now shewn to me and marked with the letter “A” to contain the true and original last will and testament of the said C.D.

2. At the time of the execution of the said will the said testator was of the full age of twenty-one years, and I am now of the full age of twenty-one years.

3. The executor named in the said will is dead not having taken out probate (*or has renounced all right and title to the probate and execution of the said will, or as the case may be.*)

4. I am the residuary legatee named in the said will (*or as the case may be*).

5. I will faithfully administer the estate and effects of the said deceased by paying his just debts and the legacies contained in his will so far as the same will thereunto extend and the law bind me and by distributing the residue (if any) of the estate according to law, and I will exhibit under oath a true and perfect inventory of all and singular the said estate and effects and render a just and true account of my administration when lawfully required to do so.

Sworn before me at                      ,  
in the Province of Manitoba,  
this                      day of                      ,  
A.D. 19   .

A Commissioner in B.R.

### OATH OF ADMINISTRATOR.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of C.D., deceased.

I (name, residence and occupation to be given in full), make oath and say as follows:—

1. The said C.D. died, intestate, a bachelor without leaving father or mother (*or leaving a widow and children, or as the case may be*).

2. I am the eldest brother of the said deceased (*or as the case may be*).

3. I am of the full age of twenty-one years.

4. I will faithfully administer the estate and effects of the said deceased by paying his just debts and distributing the residue of his estate according to law, and I will exhibit under oath a true and perfect inventory of all and singular the said estate and effects and render a just and true account of my administration when lawfully required to do so.

Sworn before me at \_\_\_\_\_,  
in the Province of Manitoba,  
this \_\_\_\_\_ day of \_\_\_\_\_,  
A.D. 19\_\_\_\_.

A Commissioner in B.R.

*Note.*—If the applicant is not the person primarily entitled to the grant a clause must be inserted shewing the special grounds on which he claims to be entitled to it.

RENUNCIATION OF PROBATE OR OF ADMINISTRATION WITH WILL  
ANNEXED.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

Whereas A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the Province of Manitoba, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_,

A.D. 19 , having in his lifetime duly made his last will and testament, bearing date the day of , A.D. 19 , and thereof appointed C.D. executor (*or as the case may be*) as I am informed and believe.

Now I, the said C.D., do hereby expressly renounce all my right and title to the probate and execution of the said will of the said deceased.

In witness whereof I have hereunto set my hand and seal this day of , A.D. 19 .

Signed, sealed and delivered  
in the presence of

C.D. (Seal)

*Note.*—The above form may be varied when the renunciation is by the widow or other person entitled to administration with the will annexed.

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#### RENUNCIATION OF ADMINISTRATION.

*In the Surrogate Court of the Judicial District of the  
Province of Manitoba.*

Whereas A.B., late of the of , in the Province of Manitoba, deceased, died on the day of , A.D. 19 , intestate;

And whereas I, C.D., of the of , in the said Province, am his lawful widow (*or as the case may be*),

Now I, the said C.D., do hereby expressly renounce all my right and title to letters of administration of the estate and effects of the said deceased.

In witness whereof I have hereunto set my hand and seal this day of , A.D. 19 .

Signed, sealed and delivered  
in the presence of

C. D. (Seal)

*Note.*—In every case a renunciation must be accompanied by an affidavit of execution.

ADMINISTRATOR'S BOND.

Know all men by these presents, that we, A.B., of the  
of , in the Province of Manitoba, druggist; C.D., of the  
of , in the Province of Manitoba, , and  
E.F., of the of , in the Province of Manitoba,  
, are jointly and severally bound unto G.H., the Judge  
of the Surrogate Court of the Judicial District, in the  
sum of dollars, to be paid to the said G.H., or the Judge  
of the said Court for the time being, for which payment well and  
truly to be made, we bind ourselves and each of us for the whole,  
our and each of our heirs, executors and administrators, firmly  
by these presents, sealed with our seals.

Dated the day of , A.D. 19 .

The condition of this obligation is such that if the above-  
named A.B., the intended administrator of all and singular the  
estate and effects of I.J., late of the of , in the  
Province of Manitoba, deceased, who died on the day of  
, A.D. 19 , do, when lawfully called upon in that be-  
half, make or cause to be made a true and perfect inventory of  
all and singular the estate and effects of the said deceased which  
have or shall come into the hands, possession or knowledge of the  
said A.B., or into the hands and possession of any other person  
or persons for him, and the same so made do exhibit or cause to  
be exhibited unto the said Court whenever required by law so to  
do, and the same estate and effects and all other the estate and  
effects of the said deceased at the time of his death which at any  
time after shall come into the hands or possession of the said A.  
B. or into the hands or possession of any other person or persons  
for him do well and truly administer according to law, that is to  
say: do pay the debts which the said deceased did owe at his de-  
cease, and further do make or cause to be made a just and true  
account of his said administration whenever required by law so  
to do, and all the rest and residue of the said estate and effects  
do deliver and pay unto such person or persons respectively as

shall be entitled thereto under the provisions of any Act of the Legislature, or law, now in force or that may hereafter be in force in Manitoba; and if it shall hereafter appear that any last will and testament was made by the deceased and the executor or executors therein named, or other persons entitled to do so, do exhibit the same unto the said Court making request to have it allowed and approved accordingly, if the said A.B. being thereunto required do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of no effect or else to remain in full force and virtue.

Signed, sealed and delivered

in the presence of

A.B. (Seal)

C.D. (Seal)

E.F. (Seal)

#### ADMINISTRATOR'S BOND (WILL ANNEXED).

Know all men by these presents, that we, A.B., of the  
of , in the Province of Manitoba, druggist; C.D., of the  
of , in the Province of Manitoba, and E.F., of  
the of , in the Province of Manitoba, are jointly  
and severally bound unto G.H., the Judge of the Surrogate Court  
of the Judicial District, in the sum of dollars,  
to be paid to the said G.H., or the Judge of the said Court for the  
time being, for which payment well and truly to be made, we  
bind ourselves and each of us for the whole, our and each of our  
heirs, executors and administrators firmly by these presents,  
sealed with our seals.

Dated the day of , A.D. 19 .

The condition of this obligation is such that if the above-named A.B., the intended administrator of all and singular the estate and effects of I.J., late of the of , in the Province of Manitoba, deceased, who died on the day of , 19 , do, when lawfully called upon in that behalf,



make or cause to be made a true and perfect inventory of all and singular the estate and effects of the said deceased which have or shall come into the hands, possession or knowledge of the said A.B., or into the hands and possession of any other person or persons for him and the same so made do exhibit or cause to be exhibited into the said Court whenever required by law so to do, and the same estate and effects and all other the estate and effects of the said deceased at the time of his death which at any time after shall come into the hands or possession of the said A. B., or into the hands or possession of any other person or persons for him do well and truly administer according to law, that is to say: do pay the debts which the said deceased did owe at his decease, and then the legacies contained in the will annexed to the letters of administration so to be committed to the said A.B., so far as such estate and effects will thereto extend and the law bind him, and further do make or cause to be made a just and true account of his said administration when thereunto lawfully required, and all the rest and residue of the said estate and effects shall deliver and pay unto such person or persons as shall be by law entitled thereto, then this obligation to be void and of no effect or else to remain in full force and virtue.

Signed, sealed and delivered

in the presence of

A.B. (Seal)

C.D. (Seal)

E.F. (Seal)

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AFFIDAVIT OF JUSTIFICATION.

*In the Surrogate Court of the                      Judicial District of the  
Province of Manitoba.*

In the estate of                      , deceased.

We, C.D., of the                      of                      , in the Province of Manitoba, grocer, and E.F., of the                      of                      , in the said Province, farmer, severally make oath and say that we are the

proposed sureties on behalf of the intended administrator of the estate and effects of the said deceased in the within bond named, for the faithful administration of the said estate and effects;

And I, the said C.D., for myself, make oath and say that I am possessed of estate of the value of \$ , and am worth \$ , all my debts being first paid, and also over all statutory and legal exemptions and every other sum for which I am now surety;

And I, the said E.F., for myself, make oath and say that I am possessed of estate of the value of \$ , and am worth \$ , all my debts being paid, and also over and above all statutory and legal exemptions and every other sum for which I am now surety.

The above-named C.D., ,  
and E.F., , were severally  
sworn before me on the       day  
of       , A.D. 19       , at the  
of       in the Province of Mani-  
toba.

C.D.       (Seal)

E.F.       (Seal)

A Commissioner in B.R.

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CAVEAT.

*In the Surrogate Court of the       Judicial District of the  
Province of Manitoba.*

Let nothing be done in the estate of A.B., late of the  
of       , in the Province of Manitoba, farmer, deceased, un-  
known to C.D., of the       of       , in the said Province,  
butcher, whose postoffice address is       (or unknown to E.  
F., of the       of       , in the said Province, the solicitor  
of C.D., of the       of       , in the said Province).

The said C.D. is the lawful son of the said deceased (*or as the case may be*).

The grounds on which this caveat is entered are that the paper writing alleged to be the will of the deceased was not executed by him (*or as the case may be*).

Dated at            this            day of            , A.D. 19   .  
C.D.,  
*or* E.F., Solicitor for C.D.

*Note.*—A caveat must be accompanied by the affidavit or statutory declaration prescribed in Rule 37.

BOND ON APPEAL TO COURT OF KING'S BENCH.

Know all men by these presents that we, A.B., of the  
of \_\_\_\_\_, in the Province of Manitoba, and C.D., of the  
of \_\_\_\_\_, in the said Province, are jointly and severally bound  
unto E.F., of the \_\_\_\_\_ of \_\_\_\_\_, in the said Province, in the  
sum of \$200, to be paid to the said E.F., for which payment, well  
and truly to be made, we bind ourselves and each of us for the  
whole, our and each of our heirs, executors and administrators  
firmly by these presents, sealed with our seals.

Dated the                  day of                  , A.D. 19     .

Whereas the said A.B. considers himself aggrieved by a certain order made on the                      day of                      , A.D. 19                      , by the Judge of the Surrogate Court of the                      Judicial District (*or* is dissatisfied with the determination in point of law of the Judge of the                      Judicial District) in a certain matter arising in the estate of E.F., deceased, and desires to appeal therefrom to the Court of King's Bench (*or* to a single Judge of the Court of King's Bench).

Now the condition of this obligation is such that if the said A.B. shall effectually prosecute his appeal and pay such costs, charges and expenses as shall be awarded against him on the hearing or other disposition thereof, then this obligation to be void or else to remain in full force.

Signed, sealed and delivered

in the presence of

A.B. (Seal)

C.D. (Seal)

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#### FORMS IN SOLEMN FORM PROCEEDINGS.

The petition may be the same as in common form proceedings except that the prayer shall ask that the will be proved in solemn form and the proofs may be as in common form proceedings with such special matter added as is necessary to shew that it is desirable that the will be proved in solemn form.

[*Manitoba Gazette, January 27, 1906.*]

## SCHEDULE OF FEES.

*No. 10683, dated April 10, 1906.*

That the tariff of fees to be taken and received by barristers, attorneys and solicitors practising in the Surrogate Courts, in respect of business in such Courts, fixed by the Judges of the said Courts and set out hereunder, has been approved.

In pursuance of chapter 19 of 5 & 6 Edw. VII, being "An Act to amend the Surrogate Courts Act," we, the Judges of the Surrogate Courts, do make, subject to the approval of the Lieutenant-Governor-in-Council, the following additional rules of the said Courts, to take effect on and after the first day of May, A.D. 1906.

67. Barristers, solicitors and attorneys practising in the Surrogate Courts shall be entitled to take for the performance of business and services under the Act the fees and allowances set forth in the subjoined tables.

68. It shall be competent for a Judge to lessen or increase any of the items in the said tables if he shall see good reason for doing so, and to make such allowance for any matter not provided for as he thinks just.

## I. NON-CONTENTIOUS MATTERS.

1. *Applications and Proofs.*

(1) Preparation of all necessary papers and proofs to lead grant, attendance for and taking out same—

When the value of the property devolving is

(a) Under \$1,000. . . . .	\$ 9 00
(b) \$1,000 and under \$4,000. . . . .	12 00
(c) \$4,000 and under \$10,000. . . . .	18 00
(d) \$10,000 and under \$20,000. . . . .	30 00
(e) \$20,000 and under \$50,000. . . . .	40 00
(f) \$50,000 and upwards. . . . .	50 00



(2) In cases of temporary administration or administration granted pending any suit touching the validity of a will, when no special difficulties exist, such sum not to exceed \$15, as the Judge may think proper.

(3) When, because of exceptional circumstances, the solicitor is required to prepare papers or perform other services beyond what is usually necessary, he shall be allowed therefor what is reasonable in addition to the foregoing fees.

## 2. *Audit and Passing Accounts.*

(1) When the accounts are brought in voluntarily, and the next of kin or devisees or creditors do not appear, or appearing there are no contentious proceedings or disputed accounts:—

Taking instructions. . . . .	\$ 2 00
Preparing accounts, per folio. . . . .	20
Each necessary copy, per folio. . . . .	10
Affidavit verifying same, per folio. . . . .	20
Attending to get sworn to. . . . .	25
Attending to file same and taking out appointment. . .	1 00
Each necessary copy of appointment, per folio. . . . .	10
Attending to serve such persons as the Judge shall direct, each. . . . .	25
Affidavit of service, including attendance and paid commissioner. . . . .	50
Attending the audit, and exhibiting accounts and vouchers, and numbering same. . . . .	5 00
If engaged more than two hours, for each subsequent hour necessarily engaged. . . . .	2 00
Drawing up order for allowance to executor or administrator, and order for the passing of the accounts and engrossing, including copies. . . . .	1 00
Bill of costs and copy. . . . .	50
Attending taxation. . . . .	50

(2) When the accounts are brought in by Judge's order, and the proceedings are contentious, or where there are disputed accounts, the same fees as nearly as possible shall be allowed as are payable to solicitors (and counsel, where counsel properly attend) upon references in the Master's office in the Court of King's Bench.

## II. CONTENTIOUS MATTERS.

### 1. *Instructions.*

For caveat or other initial proceedings.....	\$ 3 00
For any subsequent proceedings (in discretion of Judge)..	1 00

### 2. *Drawing Papers.*

Caveat, affidavit, notice, order or other papers, per folio..	20
Copies, per folio. ....	10

### 3. *Attendances.*

Every special attendance in the course of a proceeding...	1 00
To be increased in the discretion of the Judge, not to exceed. ....	3 00
Common and necessary attendances when not included in some other provision or fee.....	25

### 4. *Counsel Fees.*

On motion in matters not special.....	1 00
On special motion or application.....	3 00
To be increased in the discretion of the Judge to a sum not to exceed. ....	6 00
On argument in supporting or opposing motion or application. ....	5 00
To be increased in the discretion of the Judge to a sum not to exceed. ....	25 00
On trial of issue.....	10 00
To be increased by the Judge at his discretion in special or important cases to a sum not to exceed.....	25 00
On examination in Chambers, per hour.....	2 00

5. *Letters.*

Common letters necessary in the course of the proceedings, including agency letters.....	25
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6. *Bill of Costs.*

Drawing bill for taxation, including engrossing and copy for clerk, per folio, when taxed.....	30
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7. *Service of Papers.*

The same fees and mileage for service of papers shall be allowed as are allowed to bailiffs in County Court cases.

When the service is not made by a sheriff or bailiff of the County Court the allowance shall be in the discretion of the Judge.

Where the service is to be effected outside of Manitoba, or by publication or substitution, such sum shall be allowed as the Judge considers reasonable under the circumstances.

8. *Disbursements.*

Court fees, witness fees (on the County Court scale), postage and other necessary disbursements, are to be added to the solicitor's bill in all cases.

9. *Miscellaneous.*

When as the result of contentious proceedings an order for a grant is made, the fees to the solicitor for taking out the grant shall be the same as are provided for in non-contentious cases.

Where it has been proved to the satisfaction of the Judge that steps have been taken by solicitors out of Court to expedite proceedings or compromise disputes, by means of which steps costs have been saved, an allowance is to be made therefor in the discretion of the Judge. This shall apply whether the proceedings are contentious or non-contentious.

## ADDITIONAL FORMS,

MANY OF THEM ADAPTED FROM THOSE IN USE IN  
THE ENGLISH PROBATE PRACTICE.

1. ADVERTISEMENT—NOTICE OF APPLICATION FOR LETTERS OF ADMINISTRATION. WHERE INTESTATE RESIDED OUT OF ONTARIO (SURROGATE COURTS ACT, R.S.O. 1897, CH. 59, SEC. 39).

### Notice of Application.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of \_\_\_\_\_ , deceased.

Notice is hereby given that after publication of this notice in three successive issues of the *Ontario Gazette*, C.D., of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ , will make application to the Surrogate Court of the County of \_\_\_\_\_ for letters of administration of the estate of \_\_\_\_\_ , late of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ , in the State of California, but formerly of the Township of \_\_\_\_\_ , in the said County of \_\_\_\_\_ , yeoman, deceased, who died at the said \_\_\_\_\_ of \_\_\_\_\_ , on the \_\_\_\_\_ day of \_\_\_\_\_ , A.D. 19 \_\_\_\_\_ , intestate, having no fixed place of abode in the Province of Ontario at the time of his death, but leaving property to be administered within the said County of \_\_\_\_\_ , in the said Province.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ .

(Sgd.) \_\_\_\_\_ C. D.

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2. ADVERTISEMENT—NOTICE OF APPLICATION FOR PROBATE. WHERE TESTATOR RESIDED OUT OF ONTARIO (SURROGATE COURTS ACT, R.S.O. 1897, CH. 59, SEC. 39).

### Notice of Application.

In the Surrogate Court of the County of \_\_\_\_\_ .

Notice is hereby given that after the publication hereof in

three successive issues of the *Ontario Gazette*, and  
 , of the Village of , in the State of New York,  
 executors of the last will and testament of , late of the  
 same place, deceased, will apply to the Surrogate Court of the  
 County of , for probate in Ontario of the will of the said  
 , deceased, who died on or about the day of  
 , 19 , at aforesaid, having at the time of his  
 death no fixed place of abode in Ontario, but leaving property  
 in the County of , to be administered.

.....  
 Solicitors for the Applicants.

Dated the day of , 19 .

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3. ADVERTISEMENT—NOTICE OF APPLICATION FOR LETTERS OF  
 GUARDIANSHIP. ACT RESPECTING INFANTS, R.S.O. 1897, CH.  
 168, SEC. 12.

Notice of Application.

In the Surrogate Court of the County of .

In the matter of the guardianship of A.B., the infant child  
 of D.B., of the Village of , County of , labourer,  
 deceased.

Notice is hereby given that after the expiration of twenty  
 days from the first publication of this notice, application will be  
 made to the Surrogate Court of the County of , for a  
 grant of letters of guardianship of the above-named infant to  
 A.T., of the City of , and E.T., of the said Village of  
 , builder, the aunt and uncle respectively of the said in-  
 fant.

.....  
 Solicitors for the Applicants.

Dated the day of , 19 .



4. ABSTRACT OF ORDER OF CITATION FOR ADVERTISEMENT.

In the Surrogate Court of the County of .  
To C. D.

Take notice that an order has issued directing you to cause an appearance to be entered for you in the office of the Registrar of the Surrogate Court of the County of , at , within thirty days after publication hereof and accept or refuse letters of administration of all the estate which by law devolves upon and vests in the personal representative of A.B., late of the of , in the County of , grocer, deceased, or shew cause why letters of administration of the said estate should not be granted to E.F. And it is further ordered that in default of your appearance letters of administration may be granted to the said E.F.

(Sgd.) G. H.,  
Registrar.

5. AFFIDAVIT BY CREDITOR FOR ADMINISTRATION OF ESTATE OF DECEASED PERSON.

In the High Court of Justice.  
In the matter of the estate of C.D., deceased.  
Between A.B., plaintiff,  
and  
E.F., defendant.

I, A.B., of, etc., the above-named plaintiff, make oath and say as follows:—

1. That the above-named C.D. was in his lifetime, and his estate still is justly and truly indebted to me in the sum of \$ for goods sold and delivered by me as a merchant, to the order and for the use of the said C.D. in his lifetime and at his request (or as the case may be).

2. That the particulars of the charges or items composing the said sum of \$ , are set forth in the paper writing now

produced and shewn to me marked "A," and that the charges therein contained are fair and reasonable, and such as are customary in the trade of merchants.

3. And I, speaking positively for myself, and, to the best of my knowledge and belief, as to other persons, say that I have not, nor has nor have any person or persons by my order, or for my use, received the said sum of \$ , or any part thereof, or any security for or on account of the said debt.

4. That the said C.D. died on or about the day of , in the year, etc., having made his last will and testament, whereby he devised the whole of his real estate unto the above-named defendant, and thereby empowered him to sell such real estate and authorized him to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate, and he thereby appointed the said defendant executor of his said will, which was duly proved by him in the Surrogate Court of the County of , on the day of , in the year, etc., as I know from the perusal and inspection of a certified copy of the probate of such will.  
Sworn, etc.

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6. AFFIDAVIT—ADMINISTRATOR'S OATH. WHERE ADMINISTRATOR CAN DEPOSE TO ALL FACTS TO LEAD GRANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of , farmer, make oath and say:—

I. That I am the eldest surviving brother of, and the person applying for letters of administration of the property of A.B., in his lifetime of , in the County of , farmer, but now deceased.

2. That the said deceased died on or about the                      day of                      , 18                      , at                      , and that he at the time of his death had his fixed place of abode at the                      of                      , in the said County of                      .

3. That the said deceased died a widower, leaving one child (a son named                      , now under the age of twenty-one years, and being about                      years old), and no other children or descendants of any him surviving.

4. That the value of the whole property of the said deceased which he in any way died possessed of or entitled to, and for and in respect of which letters of administration are to be granted, is under                      dollars.

5. That the value of the personal estate and effects is under                      dollars, and of the real estate is under                      dollars, and that full particulars and a true appraisement of all said property are exhibited herewith, and are set forth in Exhibit "A" hereto, which contains a full, true and correct inventory and valuation of the real and personal estate and effects of said deceased at the time of his death, so far as I have been able to ascertain the same.

6. That I have made a diligent and careful search in all places where the deceased usually kept his papers, and in the office of the Registrar of this Court, in order to ascertain whether the deceased had or had not left any will; but that I have been unable to discover any will or codicil or testamentary paper, and I verily believe that the deceased died without having left any will or codicil or other testamentary paper whatsoever.

7. That I will faithfully administer the property of the said deceased by paying his just debts, and distributing the residue (if any) of his estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the



7.

AFFIDAVIT OF EXECUTOR.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of , in the County of (addition),  
make oath and say:—

1. That I am the executor named in the last will and testament of , in his lifetime of the of , in the County of , but now deceased.

2. That the said deceased died on or about the day of , 19 , at the of aforesaid, and that he at the time of his death had his fixed place of abode at in the said County of .

3. That the value of the whole property of the said deceased, which he in any way died possessed of or entitled to, and for and in respect to which probate of the said will is to be granted, is under dollars.

4. That the value of the personal estate and effects is under dollars, and of the real estate is under dollars, and that full particulars and a true appraisement of all said property are exhibited herewith and are set forth in Exhibit "A" hereto, which contains a full and true and correct inventory and valuation of the real and personal estate and effects of said deceased at the time of his death, so far as I have been able to ascertain the same.

5. That I believe the paper writing hereto annexed and marked as Exhibit "B" hereto, and marked by me, to contain the true and original last will and testament of the said .

6. That I will faithfully administer the property of the said testator by paying his just debts and the legacies contained in his said will so far as the same will thereunto extend and the law bind me, and by distributing the residue (if any) of the estate according to law, and that I will exhibit under oath a true and





	Value.			Value.	
Household Goods and Furniture.			Cash on Hand or in Bank.....		
Farming Imple- ments.....			Money Secured by Mortgage..		
Horses.....			Book Debts, Pro- missory Notes		
Horned Cattle, Sheep, and Swine .....			and other Se- curities.....		
Farm Produce of all kinds.....			Other Personal Property not		
Money Secured to Estate by Life Insurance ....			before men- tioned. ....		
Bank Stock and other Stock...			Total Personality		
Stock-in-Trade..			Real Estate, esti- mated (encum- bered to the amount of \$ )		

8. AFFIDAVIT VERIFYING ALTERATIONS IN A WILL BY THE WRITER  
THEREOF.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
physician, make oath and say:—

1. That the last will and testament of the said A.B., late of  
the of , in the County of (occupation),  
deceased, hereunto annexed, marked “A,” and bearing date the  
day of , 19 , wherein there is an erasure ap-  
pearing at the beginning of the line on the page or side  
thereof, immediately before the words , and whereon  
there is an interlineation of the word between the  
and lines of the said page, is throughout in my hand-  
writing.

2. That the said erasure and interlineation were made by me in the said will in the manner and form as the same now appear previously to the execution of the said will by the said A.B., the testator.

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19    , be-  
 fore me.                      }

(Sgd.)    C. D.

*(A person authorized to administer oaths under the Act.)*

#### 9. AFFIDAVIT AS TO FOREIGN LAW.

In the Surrogate Court of the County of    .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of  
 (attorney-at-law, advocate, or other person conversant with the  
 laws of the country in question, or in Scotland a Writer to the  
 Signet), make oath and say as follows:—

1. I am conversant with the laws and constitutions of the  
 Kingdom of                      (here set out fully the circumstances in  
 which the deponent has acquired his knowledge, the length of  
 his experience, and any other circumstances tending to give  
 weight to his evidence).

2. I have carefully examined and perused the last will and  
 testament of the said A.B., of the                      of                      , in the  
 County of                      (occupation), deceased, hereunto annexed,  
 marked "A," and bearing date the                      day of                      ,  
 and the said will is made in conformity to and is valid by the  
 aforesaid laws and constitutions.

Sworn at the  
                     of                      , in the  
 County of                      , this  
 day of                      , A.D. 19    , be-  
 fore me.                      }

(Sgd.)    C. D.

*(A person authorized to administer oaths under the Act.)*

10. AFFIDAVIT AS TO STATUS OF TESTATOR.

In the Surrogate Court of the County of .  
In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
(occupation), make oath and say:—

1. That I am the sole executrix named in the last will and testament of the said A.B., late of the of , in the County of , (occupation), deceased, hereunto annexed and marked "A," bearing date the day of , 19 .

2. That the said will was made at the of , i  
the County of .

3. That the said A.B. was a British subject, and was born of parents who were British subjects at the of , in the of , that his domicile of origin was the Province of Ontario (or as the case may be).

Sworn at the

of	in the	} (Sgd.) C. D.
County of	, the	
day of	, A.D. 19 , be-	
fore me.		

(A person authorized to administer oaths under the Act.)

11. AFFIDAVIT AS TO DOMICILE.

In the Surrogate Court of the County of .  
In the estate of A.B., deceased.

I, C.D., of the of , in the County of  
(occupation), make oath and say:—

1. That I knew and was well acquainted with the said A.B., of the of , in the State of New York, one of the United States of America, deceased, who died on or about the day of , at the of , in the County of and Province of .

2. That the said deceased was at the time of his death, domiciled in the said State of New York, one of the United States of America.

3. That (here set out fully the grounds on which the assertion as to domicile is made).

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.                      }                      (Sgd.)                      C. D.

*(A person authorized to administer oaths under the Act.)*

## 12. AFFIDAVIT OF CREDITOR TO LEAD ORDER OF CITATION.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
 baker, make oath and say:—

1. That the said A.B., late of the                      of                      , in the  
 County of                      , (occupation), deceased, died on or about the  
                     day of                      , 19                      , at the                      of                      , in the  
 County of                      , intestate, a bachelor without parent, brother  
 or sister, uncle or aunt, nephew or niece, cousin german or any  
 other known relation.

2. That the said deceased was at the time of his death justly  
 and truly indebted to me in the sum of                      dollars of lawful  
 money of Canada (here set out shortly the nature of the indebted-  
 edness), and that no part of such sum has been since received  
 by me or by any person on my behalf, but that the whole thereof  
 still remains justly due and owing to me.

3. That I hold no security whatever for the said indebtedness  
 or any part thereof.



4. That the estate of the said deceased consists of (here set out the amount and particulars).

Sworn at the	}	
of		in the
County of		, the
day of		, A.D. 19
fore me.		(Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

13. AFFIDAVIT AS TO ADVERTISEMENT FOR NEXT OF KIN.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, E.F., of the of , in the County of ,  
solicitor, make oath and say:—

1. I am the solicitor herein of C.D., of the of ,  
in the County of , farmer, the party applying for letters  
of administration of the estate of the said A.B., late of the  
of , in the County of , brewer, deceased.

2. Acting on behalf of the said C.D., I caused the advertise-  
ment, a newspaper clipping of which is hereunto annexed and  
marked "A," requesting the relations, if any, of the said de-  
ceased to apply to me, to be inserted in the morning  
newspaper published at the of , in the County of  
, in the issues of the said newspaper published on the  
days of , and in the issues of the newspaper  
called the , and published on the days of .

3. That no application whatever has been made to me, this de-  
ponent, in consequence of or in answer to the said advertisements,

nor have I been able to obtain any information regarding the relations, if any, of the said deceased.

Sworn at the

County of \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, in the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_, before me. \_\_\_\_\_ (Sgd.) E. F.

*(A person authorized to administer oaths under the Act.)*

#### 14. AFFIDAVIT AS TO ADVERTISEMENT FOR THE RECOVERY OF A LOST WILL.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, E.F., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, solicitor, make oath and say:—

1. I am the solicitor of C.D., the sole executrix named in the last will and testament of the above-named A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, and the party now applying to the said Court for probate of a copy of the said will.

2. That I caused to be inserted in the \_\_\_\_\_, a daily morning journal published at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and having a large circulation in the said County (or as the case may be), the advertisement, a newspaper clipping of which is taken from the regular issue of the said newspaper, and is hereunto annexed, marked "A."

3. That I have carefully examined the files of the said newspaper, and the said advertisement, a copy of which is hereunto annexed, marked "A," appeared in the regular issues of the said newspaper on the following days, that is to say: (here set out the dates).

4. No information has been given to me in consequence of or in answer to the said advertisement, nor have I been able to obtain any information respecting the original will therein referred to.

Sworn at the  
                     of                      in the }  
 County of                      , the                      (Sgd)      E. F.  
 day of                      , A.D. 19                      , be-  
 fore me.

*(A person authorized to administer oaths under the Act.)*

15.      ADVERTISEMENT FOR THE RECOVERY OF A LOST WILL.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

A.B., late of the                      of                      , in the County of                      ,  
 innkeeper, deceased, duly executed his will on or about the  
                     day of                      , 19                      , in the presence of C.D.,  
 of                      , solicitor, and E.F., of                      , physician.  
 By this will the testator gave his personal estate to  
 his wife, C.B., and devised his real estate to her for life and af-  
 terwards to his children. He appointed his wife sole executrix.  
 He died on the                      day of                      , 19                      , at the                      of  
                     , in the County of                      . One week after his death  
 a true copy of the will was made from the original, but the latter  
 cannot now be found. Whoever will bring the original will or  
 give such information as will lead to its discovery, to Mr. C.D.,  
 of                      , solicitor, will be rewarded.

16.      AFFIDAVIT IN PROOF OF LUNACY.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

We, C.D., of the                      of                      , in the County of

physician, and E.F., of the                      of                      , in the County of                      , nurse, severally make oath and say:—

I, the said C.D., for myself make oath and say.

1. That for the                      and                      year now last past I have attended in my professional capacity E.B., formerly of the                      of                      , in the County of                      , (occupation), who is, as I am informed and believe, the natural and lawful father of the said A.B., late of the                      of                      , in the County of                      , deceased.

2. The said E.B. is a patient under the care of my fellow deponent, the said E.F., in the lunatic asylum at the                      of                      , in the County of                      aforesaid.

3. The said A.B. has been for many years and is now a lunatic, and thoroughly incapable of managing himself or his affairs or of doing any act requiring thought, judgment or reflection, and is not likely soon to recover the use of his mental faculties.

And I, the said E.F., for myself make oath and say.

4. That I am a nurse in the said lunatic asylum where the said E.B. is now confined.

5. That the said E.B. has been for                      years last past confined therein, and has been under my care as a person of unsound mind, and that he is a lunatic and totally incapable of managing himself or his affairs.

Sworn by the said C.D. and E.F.	}		
at the                      of                      in the			
County of                      , this		(Sgd.)	E.F.
day of                      , A.D. 19                      , before		(Sgd.)	C. D.
me.			

*(A person authorized to administer oaths under the Act.)*

17. AFFIDAVIT OF WIDOW TO LEAD A JOINT GRANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
widow, make oath and say :—

1. That the said A.B., late of the of , in the  
County of , (occupation), deceased, died at the  
of , in the County of , on the day of  
, 19 , intestate, leaving me this deponent his lawful  
widow and relict, and E.F., G.H. and I.K., his natural and law-  
ful and only children.

2. That I have been advised that, by law, as the lawful widow  
and relict of the said deceased, I am entitled primarily and by  
preference, to have the letters of administration of the estate of  
the said deceased, granted to myself alone, but I am, notwith-  
standing the same, consenting and desirous, that the said E.F.,  
who is the eldest son of myself and the said deceased, be joined  
with me in the letters of administration in the estate of the said  
deceased.

Sworn at the	}	(Sgd.)	C. D.
of			
County of , the			
day of , A.D. 19 , be-			
fore me.			

*(A person authorized to administer oaths under the Act.)*

18. AFFIDAVIT TO LEAD A JOINT GRANT OF ADMINISTRATION TO  
GUARDIANS.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
(occupation), make oath and say :—



1. That A.B., late of the                      of                      , in the County of                      , butcher, deceased, died on or about the                      day of                      , 19                      , at the                      of                      , in the County of                      , a widower, intestate, leaving him surviving E.B., spinster, and F.B., his natural and lawful and only children and only next of kin who are both now in their minority, to wit: the said E.B. of the age of                      years only and the said F.B. of the age of                      years only.

2. That the said E.B. and F.B. have in and by an instrument in writing under their respective hands bearing date the                      day of                      , 19                      , duly elected or chosen me this deponent their lawful grandfather and next of kin, and X.Y., of the                      of                      , in the County of                      , merchant, to be their guardians for the purpose of obtaining letters of administration of the estate of the said deceased to be granted to us for the use and benefit of the said E.B. and F.B., and until one of them shall attain the age of twenty-one years.

3. I have been advised that by law and the practice of the Surrogate Court as the lawful grandfather and next of kin of the said minors duly elected by them, I am entitled primarily and by preference to have the letters of administration of the personal estate of the said deceased for the use and benefit of the said minors granted to myself alone, but I am, notwithstanding, desirous and consenting that the said X.Y., who was a friend of the said deceased, be joined with me in the letters of administration of the estate of the said deceased.

4. For the space of                      years I have been in an infirm state of health, and to some extent unable to transact business. The said X.Y. is thoroughly conversant with general business, and is also well acquainted with the affairs of the said deceased, having been a friend of his, and I verily believe that it will be for the benefit and advantage of the estate of the said deceased

and of the said minors to have the said X.Y. joined with me in the said letters of administration.

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.                      }

*(A person authorized to administer oaths under the Act.)*

19. AFFIDAVIT TO LEAD CERTIFICATE THAT BOND GIVEN COVERS  
 PROPERTY IN OTHER PROVINCES.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
 make oath and say:—

1. That A.B., late of the                      of                      , in the County  
 of                      , farmer, died on or about the                      day of                      ,  
 19                      .

2. That on the                      day of                      , 19                      , letters of ad-  
 ministration of the estate of the said deceased were granted to me  
 by the Surrogate Court of the County of                      .

3. That the gross value of the whole estate of the deceased  
 wherever situate in respect of which the said grant was made was  
 then sworn to be under                      dollars. That the gross value of  
 such real estate was under                      dollars. That the gross value  
 of the personal estate was under                      dollars, and that no ad-  
 ditional estate has since come to my knowledge.

4. That part of the said estate included in the said sworn  
 valuations amounting to                      dollars, full particulars of

which are set forth in the schedule hereunto annexed is in the Province of Manitoba (or as the case may be).

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.                      }

*(A person authorized to administer oaths under the Act.)*

20. CERTIFICATE OF REGISTRAR OF THE SURROGATE COURT AS TO  
 SUFFICIENT SECURITY HAVING BEEN GIVEN TO COVER  
 PROPERTY IN OTHER PROVINCES.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, the undersigned, Registrar of the Surrogate Court of the County of                      , in the Province of                      , do hereby certify that letters of administration of the estate of A.B., late of the                      of                      , in the County of                      , farmer, deceased, were granted by the Surrogate Court of the County of Lambton, on the                      day of                      , to C.D., of the                      of                      , in the County of                      and Province of Ontario.

And I further certify that a bond has been given to the Judge of the Surrogate Court of the County of Lambton in the sum of                      dollars, the same being sufficient in amount to cover the estate of the said deceased in the Province of Manitoba, as well as his estate in the Province of Ontario.

Dated the                      day of                      , A.D. 19                      .

.....

Registrar of the Surrogate Court of the County of                      , in  
 the Province of Ontario.

(Seal.)

21. AFFIDAVIT TO LEAD ALTERATION IN GRANT.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ (occupation), make oath and say:—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ , 19 \_\_\_\_\_ , letters of administration of the estate of the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ , carriage trimmer, deceased, were granted by the Surrogate Court of the County of \_\_\_\_\_ , to me this deponent, the natural and lawful father and next of kin of the said deceased.

2. That in the said letters of administration the date of the deceased's death is stated to be the "14th" day of November, 1898, whereas the true date was the "24th" day of the same month and year, as appears by the certificate of death hereunto annexed.

3. That the error arose by my not observing when the affidavit to lead the grant was read over to me that the wrong day, namely the "14th," had been inadvertently inserted in that document.

4. That I desire that the said letters of administration may be altered by substituting the "24th" for the "14th" in the date of death of the deceased.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the \_\_\_\_\_  
County of \_\_\_\_\_ , the \_\_\_\_\_  
day of \_\_\_\_\_ , A.D. 19 \_\_\_\_\_ , be-  
fore me. \_\_\_\_\_

(A person authorized to administer oaths under the Act.)

## 22. AFFIDAVIT TO LEAD CITATION TO ACCEPT OR REFUSE ADMINISTRATION.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, tailor, make oath and say:—

1. That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, joiner, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, intestate, without child or parent, leaving E.B., his lawful widow and relict, him surviving.

That the said E.B. has not taken upon her as yet the letters of administration of the estate of the said deceased.

3. That I am the natural and lawful brother and one of the next of kin of the said deceased, and am desirous of obtaining the letters of administration of the estate of the said deceased.

4. That the estate left by the said deceased consists of (state the nature and amount of the property).

Sworn at the

_____	of	_____	in the	} (Sgd.) C. D.
County of		_____	, the	
day of		_____	, A.D. 19____, be-	
fore me.				

*(A person authorized to administer oaths under the Act.*

## 23. AFFIDAVIT TO LEAD CITATION TO EXHIBIT AN INVENTORY.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., wife of W.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, banker, make oath and say:—

1. That the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the



County of \_\_\_\_\_, accountant, deceased, died on or about the  
day of \_\_\_\_\_, 19\_\_\_\_, at the \_\_\_\_\_ of \_\_\_\_\_, in the  
County of \_\_\_\_\_, intestate, leaving him surviving M.B., his  
lawful widow and relict, and L.S., wife of M.S., me this depon-  
ent and D.B., spinster, his natural and lawful and only children,  
and only next of kin respectively, the only persons entitled in  
distribution to his estate.

2. On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, letters of adminis-  
tration of the estate of the said deceased were granted by the  
Surrogate Court of the County of \_\_\_\_\_ to the said M.B., the  
lawful widow and relict of the said deceased.

3. The said M.B. has sworn the value of the estate of the said  
deceased to amount to \_\_\_\_\_ dollars, but I verily believe the  
same to be considerably less than the true amount and value  
thereof.

4. That part of the said estate consists of stock and growing  
crops which should be forthwith valued and appraised before the  
same are removed or sold in order that the true value thereof as  
assets belonging to the said estate may be satisfactorily ascer-  
tained.

5. Under the circumstances mentioned in the preceding para-  
graphs of this affidavit and upon other grounds, I am desirous  
of obtaining from the said Surrogate Court an order in the na-  
ture of a citation calling upon the said M.B. to exhibit upon and  
by virtue of her corporal oath a true and perfect inventory of  
all and singular the estate of the said deceased.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the \_\_\_\_\_  
County of \_\_\_\_\_, the \_\_\_\_\_  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, be-  
fore me. \_\_\_\_\_

*(A person authorized to administer oaths under the Act.)*

## 24. AFFIDAVIT TO LEAD CITATION FOR LIMITED GRANT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

We, Ann Brighton, of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, widow, and James Brighton, of the same place, merchant, severally make oath and say:—

1. In and by an adventure bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and made between, etc., certain moneys of and belonging to me, this deponent, then Ann Smith, in the said indenture particularly mentioned and described, were in consideration of the marriage then intended to be had and solemnized between her, the said Ann Smith and James Brighton, in the said indenture mentioned, assigned and transferred to the said A.B. and C.D., their executors, administrators and assigns, to hold the same upon trust, that they, the said A.B. and C.D., or the survivors of them, or the executors or administrators of such survivors, should invest the same upon Government or real security and pay the interest and dividends thereof to me, the said Ann Smith, during my life and after my decease for all and every the children and child of the said Ann Smith and James Brighton, and if only one child then for such one child only, the principal to be vested in the said children or child on their or his or her attaining the age of twenty-one years.

2. The said intended marriage was shortly afterwards duly had and solemnized between me, this deponent, then Ann Smith, spinster, and the said James Brighton, and there is issue of the said marriage one child only, to wit, I, the said James Brighton.

3. I, the deponent, James Brighton, have attained the age of twenty-one years.

4. The said James Brighton, the father, died on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

5. The said A.B. and C.D., the trustees aforesaid, lent and invested a sum of \$1,000, part of the said trust moneys, upon a

mortgage of certain leasehold premises, situate at \_\_\_\_\_, in the County of \_\_\_\_\_, and belonging to \_\_\_\_\_ of \_\_\_\_\_.

6. The said sum of \$1,000 still remains so lent and invested as aforesaid.

7. The said A.B. and C.D. are both now dead.

8. The said A.B. survived his co-trustee, the said C.D.

9. The said A.B. was of \_\_\_\_\_, and died on the day of \_\_\_\_\_, 19\_\_\_\_, a widower and intestate, leaving E.F., his natural and lawful son and only next of kin, and the sole person entitled to his personal estate him surviving, who resides at \_\_\_\_\_.

10. Letters of administration of the estate of the said A.B., deceased, have not yet been taken out by the said E.F., or by any other person.

11. We, these deponents, are respectively the only persons beneficially interested in and entitled to the said sum of \$1,000 so lent and invested as aforesaid, and in and to the interest and dividends due and to grow due thereon, to wit, I, the said Ann Brighton, to the interest and dividends thereof for and during my life, and I, the said James Brighton, the son, to the principal after the decease of the deponent, the said Ann Brighton, but the same cannot be duly administered under and according to the trusts of the said indenture until in respect thereof a legal personal representation of the said A.B., deceased, shall have been constituted by the authority of the proper Surrogate Court in that behalf or otherwise.

12. We, these deponents, are desirous of obtaining letters of administration of the estate of the said A.B., deceased, limited so far only as concerns all the right, title and interest of him, the said A.B., in and to the aforesaid sum of \$1,000 so lent and invested as aforesaid, and all interest and dividends now due and

to grow due thereon, but no further or otherwise to be granted to a person to be nominated by us for that purpose.

Sworn by the said Ann Brighton )  
 and James Brighton, at (Sgd.) James Brighton.  
 this day of , 19 , (Sgd.) Ann Brighton.  
 before me.

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25. AFFIDAVIT OF SERVICE OF CITATION.

In the Surrogate Court of the County of .

In the estate of G.H., deceased.

Between

A.B., plaintiff,

and

C.D., defendant.

I, C.D., of the of , in the County of ,  
 solicitor's clerk, make oath and say:—

1. That I did on the day of , personally serve  
 E.F., of the of , in the County of , gard-  
 ener, with a true copy of the Citation Order issued out of the said  
 Court in the above-named matter, and now hereunto annexed,  
 marked "A," by delivering such copy to and leaving the same  
 with him at the of , in the County of ,  
 and at the same time at his desire and request I shewed him the  
 original thereof.

Sworn at the  
 of in the  
 County of , the (Sgd.) C. D.  
 day of , A.D. 19 , be-  
 fore me.

*(A person authorized to administer oaths under the Act.)*

26. AFFIDAVIT OF SERVICE OF WARNING AND OF NON-APPEARANCE  
THERETO.

In the Surrogate Court of the County of .  
In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
clerk, make oath and say:—

1. That I did on the                      day of                      , 19                      , duly serve  
                    of                      with a true copy of the warning now here-  
unto annexed, marked "A," by delivering such copy to and  
leaving the same with                      , a clerk in the office of the                      ,  
solicitors, at their office aforesaid.

2. That I did on the                      day of                      , 19                      , duly and  
carefully search the book kept in the office of the Registrar of  
the said Court for entering appearances from the said  
day of                      (day of service), to the present day inclusive, to  
ascertain whether or not any appearance to the said warning had  
been entered.

3. No appearance to the said warning has been entered by  
or on behalf of any person or persons whomsoever.

Sworn at the	}	(Sgd.)      C. D.
of                      in the		
County of                      , the		
day of                      , A.D. 19                      , be-		
fore me.		

(A person authorized to administer oaths under the Act.)

27. AFFIDAVIT OF NON-APPEARANCE TO CITATION.

In the Surrogate Court of the County of .  
In the estate of A.B., deceased.

Between

C.D., plaintiff,  
and  
E.F., defendant.



I, G.H., of the                      of                      , in the County of                      , clerk, make oath and say:—

1. On the                      day of                      , an Order of Citation was issued out of the said Court and the same was duly served on                      , as appears by the Affidavit of Service thereof made by L.M., duly filed herein.

2. On the                      day of                      , 19                      , I duly and carefully searched the book kept in the office of the Registrar of the Surrogate Court of the County of                      , for the entry of appearances from the said day of                      to the present day, the                      day of                      instant, to ascertain whether or not any appearance to the said Order of Citation had been entered and no appearance to the said Order of Citation has been entered either by or on behalf of the above-named defendant.

Sworn at the	}	(Sgd.)	G. H.
of                      in the			
County of                      , the			
day of                      , A.D. 19                      , before me.			

(A person authorized to administer oaths under the Act.)

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28. AFFIDAVIT—INCREASE OF ESTATE—FURTHER SECURITY.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , carpenter, make oath and say:—

1. That on the                      day of                      , 19                      , letters of administration of the estate of A.B., late of the                      of                      , in the County of                      , tinsmith, deceased, were granted to me by the Surrogate Court of the County of                      .

2. That the gross value of the said estate in the Province of Ontario was then sworn to amount to                      dollars.

3. That I have since discovered that the value of the said estate exceeds that amount, and that the gross value thereof is dollars.

Sworn at the  
of in the  
County of , the  
day of , A.D. 19 , be-  
fore me. } (Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

29. OATH OF ADMINISTRATOR—WILL MADE UNDER POWER.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, J.H.B., of of , in the County of ,  
widow, make oath and say:—

1. That I am the lawful widow and relict of the said A.B., deceased, and that I was before my marriage with the said A.B., J.H.S., spinster.

2. The said A.B., late of the of , in the County of , broker, died on or about the day of 19 , at the of , in the County of , having made and executed his will on the day of 19 , whereby in exercise of certain powers and authorities vested in him by the will of his mother, E.B., widow, deceased, dated the day of , and proved in the Surrogate Court of the County of , on the day of , he gave and bequeathed all such estate over which at the time of his death he should have power of appointment to me this deponent, in his will described as J.H.S., and by said will he appointed me this deponent sole executrix.

3. That the said A.B., on the day of , inter-married with me, the said J.H.B., whereby the said will was re-

voked, except in so far as it was made in exercise of the said powers.

4. That by an order made on the                      day of                      , by His Honour the Judge of the Surrogate Court of the County of                      , it was ordered that letters of administration with the said will annexed of the estate of the said A.B., deceased, be granted to me, this deponent, under the limitations hereinafter mentioned.

5. That I believe this paper writing hereunto annexed to contain the true and original last will and testament of the said A.B., late of the                      of                      , in the County of                      ; broker, deceased, and that I will faithfully administer the property of the said deceased according to the tenor of his will by paying his just debts and the legacies contained in his will so far as the same shall thereto extend, and distribute the residue, if any, according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said testator and render a just and true account of my administration whenever thereunto lawfully required.

Sworn at the	}	(Sgd.)      J. H. B.
of                      in the		
County of                      , the		
day of                      , A.D. 19      , before me.		

(*A person authorized to administer oaths under the Act.*)

### 30. AFFIDAVIT OF HEIR-AT-LAW IN SUPPORT OF CLAIM TO GRANT.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , blacksmith, make oath and say:—

1. The above-named A.B., late of the                      of                      , in the County of                      , widow, was married only once, namely, to

E.B., late of the                      of                      , in the County of                      ,  
baker, who died in the lifetime of the said A.B.

2. The said A.B. died on or about the                      day of                      19                      , at the                      of                      , in the County of                      , without leaving any husband, parent, or other ancestor, and without ever having had any issue.

3. That I am the eldest brother and one of the heirs of the said A.B., being the natural and lawful and eldest born child of J.S. and E.S., his wife, who were the natural and lawful father and the natural and lawful mother of the said A.B.

4. The said A.B. died possessed of certain real estate which she became entitled to under the will of E.H., which was proved in the Surrogate Court of the County of                      , on the day of                      , 19                      , but a part of the real estate of the said E.H., was devised by the said E.H. to trustees upon trust to pay the rents thereof to the said A.B. during her lifetime, and after her death to the use of the children of the said E.S. in fee simple.

5. The said E.S. died on the                      day of                      , 19                      .

Sworn at the	}	(Sgd.)	C.D.
of                      in the			
County of                      , the			
day of                      , A.D. 19                      , be-			
fore me.			

*(A person authorized to administer oaths under the Act.)*

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31.                      ANOTHER FORM.

In the Surrogate Court of the County of                      .  
In the estate of A.B., deceased.

I, E.B., of the                      of                      in the County of                      ,  
gentleman, make oath and say:—

1. That the above-named A.B., late of the                      of                      ,  
in the County of                      , died on the                      day of                      ,

19 , seized of the following property : , which was devised to him by the will of of , who died on or about the day of .

2. That the said A.B. was also seised in fee simple of the following lands which were purchased by him (here set out the lands).

3. The said A.B. was married once only, namely, to C.B., formerly C.S., and had three natural and lawful children and no more, namely, .

4. That I, the said E.B., am the natural and lawful and eldest born child of the said A.B., being one of the three children of the said A.B. and C.B.

Sworn at the

of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(Sgd.) E. B.

*(A person authorized to administer oaths under the Act.)*

### 32. AFFIDAVIT TO LEAD ORDER TO BRING IN SCRIPT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
tailor, make oath and say:—

1. That the said A.B., late of the of , in the County of , blacksmith, deceased, died on or about the day of , 19 ; at the of , in the County of , having first made and duly executed his last will and testament, bearing date the day of , 19 , and thereby appointed E.F. and G.H. executors thereof, and me, this deponent, residuary legatee.



2. That the said will is now in the possession, within the power or under the control of the said E.F. and G.H., or one of them, and that they, the said E.F. and G.H., have neglected or declined to prove the said will or renounce the execution thereof.

3. I am desirous that the said will should be brought into the registry of the Surrogate Court aforesaid in order that I may prove the same or otherwise act as I may be advised.

4. The said E.F. resides at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and the said G.H. resides at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the }  
County of \_\_\_\_\_, the } (Sgd.) C. D.  
day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_, be- }  
fore me.

(A person authorized to administer oaths under the Act.)

### 33. AFFIDAVIT TO LEAD REVOCATION OF GRANT BY CONSENT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, grocer, make oath and say:—

1. The said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, fisherman, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, intestate, a widower without child or parent, brother or sister, uncle or aunt, nephew or niece.

2. I verily believed until I had ascertained to the contrary as hereinafter set out that the said deceased left him surviving no cousin german or cousin german once removed, and, being one of

the lawful second cousins of the said deceased, I applied to the said Court for letters of administration of the estate of the said deceased, and the same were granted to me on the day of , 19 , in my character of second cousin, on the suggestion that I was one of the next of kin of the said deceased.

3. Since the date last mentioned I have caused inquiries to be made and advertisements to be inserted in the public newspapers for and respecting the relations of the said deceased, and I have thereby ascertained that E.F., of the of , in the County of , is the lawful cousin german and next of kin of the said deceased.

4. I am therefore desirous that the letters of administration heretofore granted to me shall be revoked and declared null and void by the said Court.

Sworn at the	}	(Sgd.)	C. D.
of			
County of , the			
day of , A.D. 19 , be-			
fore me.			

(A person authorized to administer oaths under the Act.)

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#### 34. AFFIDAVIT OF EXECUTION OF RENUNCIATION OF ADMINISTRATION OR PROBATE.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, E.F., of the of , in the County of (addition), make oath and say:—

That I was present and did see the within Renunciation of Administration (or Probate) duly executed by , the parties named therein; and that the name “ ,” set and sub-

scribed as a witness thereto, is of the proper handwriting of me, this deponent, and that the same was executed at \_\_\_\_\_, in the County of \_\_\_\_\_.

Sworn before me at \_\_\_\_\_, }  
in the County of \_\_\_\_\_, this }  
\_\_\_\_\_ day of \_\_\_\_\_, A.D. }  
19 \_\_\_\_\_

.....  
A Commissioner, etc.

This affidavit is filed on behalf of the applicant.

G. H.,  
His Solicitor.

35. AFFIDAVIT VERIFYING PETITION FOR LETTERS OF GUARDIANSHIP.

In the Surrogate Court of the County of \_\_\_\_\_.

In the matter of the guardianship of the infant children of C.F.

I, A.B., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_ (addition), make oath and say:—

1. That I am the petitioner named and described in the said petition.

2. That the various facts, matters and things in the said petition contained and set forth are true in substance and in fact to the best of my knowledge and belief, and so far as I have been enabled to ascertain them.

Sworn before me the }  
day of \_\_\_\_\_, 19 \_\_\_\_\_, at the }  
\_\_\_\_\_ of \_\_\_\_\_, in the }  
County of \_\_\_\_\_.

.....  
A Commissioner, etc.

*Note.*—Besides the foregoing affidavit there must be furnished the proof required by Rule 2.

## 36. APPEARANCE TO WARNING.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Enter an appearance herein for , of the City of ,  
in the County of , to the caveat entered by him herein.

The said is a nephew of the said deceased, and his  
father, who was a brother of said deceased, is dead.

Dated at this day of , A.D. 19 .

, of (give address), Solicitor for said .

## 37. AFFIDAVIT AS TO ABSENCE OF ATTESTING WITNESSES.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

We, C.D., of the of , in the County of ,  
grocer, and E.F., of the of , in the County of  
, baker, severally make oath and say:—

1. We have each carefully inspected the last will and testa-  
ment of the said A.B., of the of , in the County  
of , butcher, deceased, the said will being now hereunto  
annexed, marked "A," and bearing date the day of  
, 19 , and subscribed by the said A.B., and we have  
carefully observed the names G.H. and M.N. subscribed to the  
said will as witnesses to the due execution thereof.

And I, the said E.F., for myself, make oath and say:—

2. That I knew and was well acquainted with the said A.B.,  
the testator, who died on the day of , at the  
of , in the County of , for many years  
before and down to the time of his death, and that during such  
period I have frequently seen him write and subscribe his name  
to writings and I have thereby become well acquainted with his  
manner and character of handwriting, and I verily believe the  
name A.B. subscribed to the said will to be of the true and pro-  
per handwriting of the said A.B., deceased.

3. That I am the uncle of the said M.N., and that the said M.N., in the month of \_\_\_\_\_, 19\_\_\_\_, left this country for some place unknown to this deponent, and has not since been heard of.

4. I have frequently seen the said M.N. write and subscribe his name to writings whereby I have become well acquainted with his manner and character of handwriting, and I verily believe that the name M.N. now appearing subscribed to the said will as witness to the due execution thereof, is of the true and proper handwriting of the said M.N.

And I, the said C.D., for myself, make oath and say :—

5. That I am the sole executor named in the said will and that I have made inquiries and have caused inquiries to be made respecting the said execution of the said will and I have ascertained that no person or persons was or were present at the execution of the said will save and excepting the said testatrix and the said G.H. and M.N. (Account for the other attesting witnesses in a similar way.)

Sworn by the said C.D. and E.F.  
at the \_\_\_\_\_ of \_\_\_\_\_, in the  
County of \_\_\_\_\_, this  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, before  
me.

(A person authorized to administer oaths under the Act.)

### 38. AFFIDAVIT AS TO DEATH OF ATTESTING WITNESSES.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

We, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
widow, E.F., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
grocer, and G.H., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
estate agent, severally make oath and say as follows :—



1. That we have carefully inspected the last will and testament of the said A.B., deceased, hereunto annexed, dated the  
day of , and have also observed the names of K.L. and M.N., subscribed to the said will as witnesses attesting the due execution thereof.

And I, the said C.D., for myself, make oath and say:—

2. I am the lawful widow and relict of the said testator and the sole executrix named in his said will.

3. That I have made inquiries, and have caused inquiries to be made, respecting the execution of the said will, and by means of such inquiries have ascertained that no person or persons was or were present at the execution of the said will, save and excepting the said testator and the said K.L. and M.N.

And I, the said E.F., for myself make oath and say:—

4. That I knew and was well acquainted with the said A.B., who died on the  
day of , 19 , at , for many years before and down to the time of his death, and that during such period I frequently saw him write and subscribe his name to writings and I have thereby become well acquainted with his manner and character of handwriting and I verily believe the name A.B. subscribed to the said will as aforesaid to be of the true and proper handwriting of the said A.B., deceased.

5. That I knew and was well acquainted with the said K.L., whose name appears subscribed to the said will as one of the attesting witnesses thereto, and the said K.L. died on or about the  
day of , 19 .

6. That during the period of my acquaintance with the said K.L., I frequently saw him write and subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and I verily believe that the name K.L. now appearing subscribed to the said will as witness to the execution thereof is of the true and proper handwriting of the said K.L.

And I, the said G.H., for myself make oath and say:—

7. That I have carefully inspected the said last will and testament of the said A.B, deceased, hereunto annexed, dated the  
day of , and have also observed the names K.L. and M.N., subscribed to the said will as witnesses attesting the due execution thereof.

8. That I am a cousin of the said M.N. whose name appears subscribed to the said will as a witness to the execution thereof, and that the said M.N. died on or about the  
day of ,  
19 .

9. That I have frequently seen the said M.N. write and subscribe his name to writings whereby I have become well acquainted with his manner and character of handwriting, and I verily believe that the name M.N. now appearing subscribed to the said will as witness to the execution thereof is of the true and proper handwriting of the said M.N.

Sworn by all of the above-named  
deponents at the of ,  
in the County of , the  
day of , A.D.  
19 , before me.

*(A person authorized to administer oaths under the Act.)*

(or if sworn at different times)

Sworn by C.D. and E.F., two of  
the above-named deponents, at the  
of , in the Coun-  
ty of , the day of  
, A.D. 19 , before me.

*(A person authorized to administer oaths under the Act.)*

39. AFFIDAVIT OF EXECUTION WHERE A WILL IS SIGNED IN THE  
ATTESTATION OR TESTIMONIUM CLAUSE.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
                    , make oath and say:—

1. That I knew A.B., late of the                      of                      , in the  
County of                      (occupation), deceased.

2. That on or about the                      day of                      , in the year  
of our Lord one thousand nine hundred and                      , I was per-  
sonally present and did see the paper writing hereunto annexed  
marked “A” executed by the said A.B., by signing his name in  
the attestation (or testimonium) clause thereof (*or as the case  
may be*) as the same now appears, meaning and intending the  
same for his final signature to his will, in the presence of me and  
of E.F., of the                      of                      , in the County of                      ,  
                    , who were both present at the same time, whereupon the  
said E.F. and I did at the request of the said A.B. and in his  
presence attest and subscribe the said will.

Sworn at the                      of                      ,  
in the County of                      , this                      }  
                    day of                      , A.D. 19                      } (Sgd.) C. D.  
before me.

(*A person authorized to administer oaths under the Act.*)

40. AFFIDAVIT OF HANDWRITING.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
widow, make oath and say:—

1. That I knew and was well acquainted with A.B., of the  
                    of                      , in the County of                      (occupation), de-

ceased, who died on or about the                      day of                      , at the  
                     of                      , in the County of                      , for many years  
 before and down to the time of his death, and during such period  
 I frequently saw him write and subscribe his name to writings,  
 whereby I became well acquainted with his manner and character  
 of handwriting, and I have now carefully perused and inspected  
 the paper writing hereunto annexed and marked "A," purport-  
 ing to be and contain the last will and testament of the said de-  
 ceased, bearing date the                      day of                      , A.D. 19                      , and  
 being subscribed thus, "A.B."

2. That I verily believe the whole of the said will, together  
 with the name A.B. subscribed thereto as aforesaid, to be of the  
 true and proper handwriting of the said A.B., deceased.

Sworn at the	of	,	} (Sgd.) C. D.
in the County of		, this	
of		, A.D. 19	
before me.		,	

*(A person authorized to administer oaths under the Act.)*

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41. AFFIDAVIT AS TO TESTATOR'S KNOWLEDGE OF THE CONTENTS  
 OF HIS WILL.

(Add to the usual affidavit of execution the following para-  
 graph.)

3. That previously to the execution of the said will by the  
 said testator, the same was read over to him by me (or by E.F.  
 in my presence) (or by the said testator in my presence), and he,  
 the said testator, at such time seemed thoroughly to understand  
 the same (or had full knowledge of the contents thereof).





paying his just debts and the legacies contained in his will so far as the same will thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law, and will exhibit under oath a true and perfect inventory of all and singular the property of the said testator and render a just and full account of my executorship whenever lawfully required.

Sworn at the

of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(A person authorized to administer oaths under the Act.)

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44. OATH OF EXECUTOR—FORMER PROBATE HAVING BEEN REVOKED.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
brewer, make oath and say:—

The said A.B., late of the of , in the County of , carpenter, deceased, died on or about the day of , 19 , at the of , in the County of , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof appointed his lawful son, me this deponent, sole executor.

That probate of an earlier will of the said testator, dated the day of , 19 , was on the day of , 19 , granted by the said Court to E.F., the sole executor therein named.

The said probate has since been voluntarily brought in by the said E.F. and revoked.

I believe the paper writing hereto annexed to contain the true and original last will and testament of the said testator and that I am the sole executor therein named; and that I will faithfully administer the property of the said testator by paying his just debts and the legacies contained in his will so far as the same will thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law and will exhibit under oath a true and perfect inventory of all and singular the property of the said testator and render a just and full account of my executorship whenever thereunto lawfully required.

Sworn at the

County of \_\_\_\_\_ of \_\_\_\_\_ in the  
day of \_\_\_\_\_, the \_\_\_\_\_  
fore me. , A.D. 19 \_\_\_\_\_, be-

(Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

45.

OATH ON PROVING THE DRAFT OF A WILL.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, confectioner, make oath and say:—

That the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, widow, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, having made and duly executed her last will and testament, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, and thereof appointed her lawful son, me this deponent, sole executor.

That at the time of the death of the said deceased, the said will was whole and unrevoked, but since the death of the said deceased, the said will has been lost and cannot now be found.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, the said Court in an action wherein \_\_\_\_\_ was plaintiff and \_\_\_\_\_ was defend-

ant, pronounced for the force and validity of the said will as contained in a draft to be granted and committed to me the sole executor therein named, limited until the original will or a more authentic copy thereof be brought into and left in the said Registry.

That I believe the said paper writing now hereto annexed, marked by me, to contain the true last will and testament (the same being the original draft thereof) of the said testatrix; that I am the sole executor therein named; and that I will faithfully administer the property of the testatrix by paying her just debts and the legacies contained in her will so far as the same will thereunto extend and the law bind me, until the original will or a more authentic copy thereof shall be brought into and left in the said Registry; and that I will exhibit under oath a true and perfect inventory of all and singular the property of the testatrix and render a just and full account of my executorship whenever thereunto lawfully required.

Sworn at the				
	of		in the	} (Sgd.) C. D.
County of		, the		
day of		, A.D. 19	, be-	
fore me.				

*(A person authorized to administer oaths under the Act.)*

---

46. OATH ON PROVING A COPY OF A WILL, THE ORIGINAL BEING LOST.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
butcher, make oath and say:—

That the said A.B., late of the of , in the  
County of , drover, deceased, died on or about the

day of \_\_\_\_\_, 19\_\_\_\_, having made and duly executed his last will and testament, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and thereof appointed his wife, D.B., since deceased, and me, the said C.D., the lawful executors thereof.

That at the time of the death of the said deceased the said will was whole and unrevoked and in the same state as when executed, but that the same has since been lost and cannot now be found.

That shortly after the death of the said deceased a copy of the said will was made by \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, solicitor, at the request of the said D.B., widow and relict of the said deceased, and the same was by him carefully compared with the original and found to be a true copy thereof.

That I believe the paper writing hereto annexed and marked by me to contain the true last will and testament of the said testator (the same being the aforesaid copy thereof); that I am the surviving executor named in the said will; and that I will faithfully administer the property of the testator by paying his just debts and the legacies contained in his will so far as the same will thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law until the original will or a more authentic copy thereof be brought into the Registry of the said Court, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the testator, and render a just and full account of my executorship whenever thereunto lawfully required.

Sworn at the

\_\_\_\_\_ of \_\_\_\_\_ in the  
County of \_\_\_\_\_, the  
day of \_\_\_\_\_, A.D. 19\_\_\_\_.  
before me.

(Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

47. OATH ON PROVING A COPY OF A WILL TRANSMITTED TO ONTARIO, THE ORIGINAL BEING IN EXISTENCE ELSEWHERE.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ ,  
carpenter, make oath and say:—

That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_  
\_\_\_\_\_, died on or about the \_\_\_\_\_ day of \_\_\_\_\_ , having  
made and duly executed his last will and testament bearing date  
the \_\_\_\_\_ day of \_\_\_\_\_ , and thereof appointed his lawful  
son, me this deponent, sole executor.

The said will was executed by the deceased when he was resident at \_\_\_\_\_ , and the same was deposited by the said deceased after the execution thereof with E.F., of that place, and who still retains possession thereof.

On the \_\_\_\_\_ day of \_\_\_\_\_ a copy of the said will was received by me in due course of post from the said E.F.

There is nowhere in Ontario a more authentic copy thereof than the aforesaid copy, and it is essential to the interest of the estate of the said deceased that probate thereof should be granted without waiting the arrival of the original will or a more authentic copy thereof.

I believe the paper writing hereto annexed and marked by me to contain the true last will and testament (the same being the aforesaid copy thereof) of the said deceased, and that I am the sole executor therein named; and that I will until the said original will or a more authentic copy thereof shall be brought into and left in the Registry of the said Court, faithfully administer the property of the said testator (*etc., as in the ordinary form*).



## 48. OATH FOR PROBATE (SAVE AND EXCEPT).

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, builder, make oath and say:—

That the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, bricklayer, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, having made and duly executed his last will and testament bearing date the \_\_\_\_\_ day of \_\_\_\_\_, and therein named his lawful son, me this deponent, executor save and except as regards all real and personal estates whatsoever vested in him upon or for the trusts or purposes of the last will and testament of E.F., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased.

I believe the paper writing hereto annexed to contain the true last will and testament of the said A.B., deceased, and that I am the executor therein named as aforesaid, and that I will faithfully administer the property of the said testator save and except so far as relates to all real and personal estates vested in the said testator upon or for the trusts or purposes of the will of the said E.F., deceased, by paying his just debts and the legacies contained in his will so far as the same will thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law; and that I will exhibit under oath a true and perfect inventory of the said estate, save and except as aforesaid; and render a just and full account of my executorship whenever thereunto lawfully required.

Sworn at the	}	(Sgd.)	C. D.
of _____ in the			
County of _____, the			
day of _____, A.D. 19____, before me.			

(A person authorized to administer oaths under the Act.)

49.

OATH FOR PROBATE (CÆTERORUM).

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.B., of the of , in the County of , gentleman, make oath and say:—

That the said A.B., late of the of , in the County of , died on or about the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and therein named E.F. executor in respect of all his literary papers and documents, and his lawful son, me this deponent, executor as to the rest of his estate.

That on or about the day of , 19 , probate of the said will, limited so far only as respected the literary papers and documents of the said testator, was granted by the said Court to the said E.F.

That I believe the paper writing hereto annexed to contain the true and original last will and testament of the said testator; that I am the executor therein named as to the rest of his estate; and that I will faithfully administer all the rest of the property of the said testator by paying his just debts and the legacies contained in his will, so far as the same will thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law; and that I will exhibit under oath a true and perfect inventory of all and singular the property of the testator save and except as aforesaid, and render a just and full account of my executorship whenever thereunto lawfully required.

Sworn at the

of	in the	} (Sgd.) C. B.
County of	, the	
day of	, A.D. 19 , be-	
fore me.		

(A person authorized to administer oaths under the Act.)

## 50. OATH FOR CESSATE PROBATE TO A SUBSTITUTED EXECUTOR.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
stockbroker, make oath and say:—

That A.B., late of the of , in the County of  
, banker, deceased, died on or about the day of  
, at , having made and duly executed his last  
will and testament bearing date the day of .

That on the day of , 19 , probate of the said  
will was granted out of the said Court to E.F., the lawful widow  
and relict of the said deceased, the executrix for life named in  
the said will. That the said E.F. died on the day of  
, 19 , whereby the said probate has ceased and expired.

That I believe the paper writing hereto annexed and marked  
by me to contain the true and original last will and testament of  
the said A.B., deceased, of which probate was granted as afore-  
said; that I am the lawful son of the said deceased, and the exe-  
cutor substituted in the said will; and that I will faithfully ad-  
minister the property of the said testator (*etc., as in the ordinary  
form*).

Sworn at the

of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(Sgd.) C. D.

(*A person authorized to administer oaths under the Act.*)

51. OATH FOR CESSATE PROBATE, THE EXECUTOR HAVING AT-  
TAINED HIS MAJORITY.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
make oath and say:—

That the said A.B., late of the                      of                      , in the County of                      , butcher, deceased, died on or about the day of                      , 19                      , at                      , having made and duly executed his last will and testament; that I am the nephew of the said deceased and the sole executor named in the said will.

That on the                      day of                      , 19                      , letters of administration with the said will annexed of the estate of the said deceased were granted by the said Court to E.D., the natural and lawful mother and lawful guardian of me this deponent, for my use and benefit until I should attain the age of twenty-one years.

That on the                      day of                      , 19                      , I attained the age of twenty-one years, and the said letters of administration with the will annexed have consequently ceased and expired.

That I believe the paper writing hereunto annexed and marked by me to contain the true and original last will and testament of the said A.B., deceased; and that I will faithfully administer the property of the said testator (*etc., as in the ordinary form*).

Sworn at the                      of                      in the }  
County of                      , the }  
day of                      , A.D. 19                      , be- }  
fore me.

(*A person authorized to administer oaths under the Act.*)

---

52. OATH FOR CESSATE PROBATE TO EXECUTOR WHERE ATTORNEY  
HAS PROVED.

In the Surrogate Court of the County of                      .  
In the estate of A.B., deceased.                      ,  
I, C.D., of the                      of                      , in the County of                      ,  
civil engineer, make oath and say:—

That the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, land surveyor, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, having made and duly executed his last will and testament; that I am the lawful son of the said deceased, and the sole executor named in the said will.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, letters of administration with the said will annexed of the estate of the said deceased were granted by the said Court to E.F., as the lawful attorney and for the use and benefit of me this deponent, and until I should apply for and obtain probate of the said will.

That I believe the paper writing hereunto annexed and marked by me to contain a true copy of the last will and testament of the said deceased; that I will faithfully administer the property of the said testator (*etc., as in the ordinary form*).

Sworn \_\_\_\_\_ at the  
\_\_\_\_\_ of \_\_\_\_\_ in the  
County of \_\_\_\_\_, the  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, be-  
fore me. }

(*A person authorized to administer oaths under the Act.*)

---

53. OATH FOR ADMINISTRATORS OF MARRIED WOMAN (CHILD TAKES ON HUSBAND RENOUNCING).

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, grocer, make oath and say:—

That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, intestate, leaving E.G., her lawful husband, her



surviving, who has duly renounced letters of administration of her estate, and that I am the natural and lawful son and one of the next of kin of the said deceased; that I will faithfully administer the property of the said testatrix (*etc., as in the ordinary form*).

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.

(A person authorized to administer oaths under the Act.)

54. OATH FOR ADMINISTRATORS (CHILD OR HEIR-AT-LAW TAKES ON WIDOW RENOUNCING).

In the Surrogate Court of the County of                      .  
 In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
 spinster, make oath and say:—

That A.B., late of the                      of                      , in the County of                      ,  
                     , deceased, died on the                      day of                      , 19                      ,  
 intestate, leaving E.B., his lawful widow and relict, who has duly renounced letters of administration of his estate, and that I am the natural and lawful daughter and one of the next of kin of the said deceased; that I will faithfully administer the property of the testator (*etc., as in the ordinary form*).

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.

(A person authorized to administer oaths under the Act.)

## 55. OATH OF ADMINISTRATOR OF ESTATE OF DIVORCED WOMAN.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, D.B., of the of , in the County of ,  
spinster, make oath and say:—

That the said A.B., late of the of , in the  
County of , deceased, formerly the wife of E.B., died on  
the day of , 19 , at , intestate, a single woman  
leaving her surviving me this deponent, her natural and lawful  
child and only next of kin; that the marriage of the said A.B.  
with the said E.B. was dissolved by an Act of the Parliament of  
Canada assented to on the day of ; that I am  
the natural and lawful daughter and only next of kin of the said  
deceased; that I will faithfully administer the property of the  
testatrix (*etc., as in the ordinary form*).

Sworn at the  
of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(*A person authorized to administer oaths under the Act.*)

56. OATH OF ADMINISTRATOR WHEN PERSONAL REPRESENTATIVE  
OF WIDOW OR CHILD TAKES THE GRANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
make oath and say:—

That A.B., late of the of , in the County of  
, blacksmith, deceased, died intestate leaving E.B., his  
lawful widow and relict, and G.B., I.B. and K.B., his natural and  
lawful and only children and only next of kin, together the only

persons entitled in distribution to his estate; that the said E.B., G.B., I.B. and K.B. have since died without having taken upon themselves the letters of administration of the estate of the said deceased.

That I am one of the executors of the will (or administrators of the estate) of the said E.B. (or of G.B., deceased) probate of the said will (or letters of administration, etc.) having been granted to me by the said Court on the                      day of                      , 19                      , and that I will faithfully administer the property of the deceased (*etc., as in the ordinary form*).

See Surrogate Rule 11.

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57. OATH OF ADMINISTRATOR (THE INTESTATE'S FATHER RENOUNCING).

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , Esq., make oath and say:—

That A.B., late of the                      of                      , in the County of                      , merchant, deceased, died a bachelor and intestate, leaving surviving him E.B., his natural and lawful father and next of kin, who has duly renounced letters of administration of his estate, and is consenting that letters of administration be granted to me, the deponent; and that I am the natural and lawful son of the said E.B.; that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

58. OATH OF ADMINISTRATOR (THE BROTHER TAKING ON THE MOTHER RENOUNCING.)

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , of the County of                      , carpenter, make oath and say:—

That A.B., late of the                      of                      , in the County of                      , builder, deceased, died a bachelor without leaving a father, and intestate, leaving E.B., widow, his natural and lawful mother, and me, this deponent, his only next of kin him surviving.

That the said E.B. has duly renounced letters of administration of his estate.

That I am the natural and lawful brother of the said deceased; and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

59. OATH OF ADMISTRATOR (BROTHER TAKES, THE MOTHER BEING DEAD).

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , saddler, make oath and say:—

That A.B., late of the                      of                      , in the County of                      , innkeeper, deceased, died a bachelor without a father him surviving, leaving E.F., his natural and lawful mother and only next of kin him surviving, who is since dead without having taken upon her letters of administration of his estate; that I am the natural and lawful brother of the said deceased and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

60. OATH OF ADMINISTRATOR (NEPHEW TAKES THE GRANT ON THE RENUNCIATION OF THE NEXT OF KIN).

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , fisherman, make oath and say:—

That A.B., late of the                      of                      , in the County of                      , fisherman, deceased, died a bachelor without parent and intestate, leaving E.B. and F.B., his natural and lawful brothers, and only next of kin him surviving.

That the said E.B. and F.B. have duly renounced letters of administration of the estate of the said A.B.

That I am the lawful nephew and one of the persons entitled in distribution to the estate of the said deceased, being the natural and lawful son of E.B., the natural and lawful brother of the said E.B., the said E.B. having died in the lifetime of the said A.B.

That I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

61. OATH OF ADMINISTRATOR (NEPHEW TAKES THE GRANT, THE NEXT OF KIN BEING DEAD).

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , baker, make oath and say:—

That A.B., late of the                      of                      , in the County of                      , tanner, died a bachelor without leaving him surviving a parent, and intestate, leaving E.B. and G.N., his natural and lawful brother and sister, and only next of kin him surviving, who have both since died without having taken upon themselves letters of administration of his estate.

That I am the lawful nephew and one of the persons entitled in distribution to the property of the said intestate, being the natural and lawful son of H.B., the natural and lawful brother also of the said A.B., the said H.B. having died in the lifetime of the said A.B.; that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).



62. OATH OF ADMINISTRATOR (THE REPRESENTATIVE OF A NEPHEW).

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
grocer, make oath and say:—

That A.B., late of the of , in the County of , draper, deceased, died a bachelor without leaving him surviving a parent, brother or sister, and intestate, leaving E.F. and G.H., his lawful nephew and niece, and only next of kin surviving; that the said E.F. and G.H. have both since died without having taken upon themselves letters of administration of the estate of the said deceased.

That I am one of the executors of the will (or administrators of the estate) of the said E.F., probate of the said will (or letters of administration of the said estate) having been granted to me by the Surrogate Court of the County of on the day of , 19 ; that I will faithfully administer the property of the deceased (*etc., as in the ordinary form*).

---

63. OATH OF ADMINISTRATOR (REPRESENTATIVE OF COUSIN GERMAN).

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
broker, make oath and say:—

That A.B., late of the of , in the County of , banker, deceased, died a bachelor without leaving parent, brother or sister, uncle or aunt, nephew or niece, and intestate, leaving E.F. and G.H., his lawful cousins german and only next of kin him surviving; that the said E.F. and G.H. have both since died without having taken upon themselves letters of ad-

ministration of the estate of the said deceased; and that I am one of the executors of the will (or administrators of the estate) of the said E.F., probate of the said will (or letters of administration, etc.) having been granted to me by the Surrogate Court of the County of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

64 OATH OF ADMINISTRATOR (SECOND COUSIN).

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, bricklayer, make oath and say:—

That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, plumber, deceased, died a bachelor without leaving him surviving a parent, brother or sister, uncle or aunt, nephew or niece, cousin german or cousin german once removed, and intestate.

That I am his lawful second cousin and only next of kin, and that I will faithfully administer the property of the deceased (*etc., as in the ordinary form*).

---

65. OATH OF ADMINISTRATOR (CREDITOR TAKING ON THE RENUNCIATION OF THE NEXT OF KIN).

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, locksmith, make oath and say:—

That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_, blacksmith, deceased, died a bachelor without a parent and intestate, leaving E.B. and F.B., his natural and lawful

brother and sister and only next of kin and the only persons entitled in distribution to his estate him surviving who have duly renounced letters of administration of his estate; and that I am a creditor of the said deceased; and that I will faithfully administer (*etc., as in the ordinary form*).

---

# 66. OATH FOR ADMINISTRATION TO ATTORNEY OF INTESTATE'S WIDOW.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
cheese merchant, make oath and say:—

That A.B., late of the of , in the County of  
, milkman, deceased, died intestate, leaving E.B., his  
lawful widow and relict, who is now residing in Australia.

That I am the lawful attorney of the said E.B., and that I will faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of his estate according to law, for the use and benefit of the said E.B., and until she shall duly apply for and obtain letters of administration of the said estate, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and full account of my administration when thereunto lawfully required.

Sworn at the

of , in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(A person authorized to administer oaths under the Act.)

## 67. OATH FOR ADMINISTRATION TO ATTORNEY OF INTESTATE'S SON.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
carpenter, make oath and say:—

That A.B., late of the of , in the County of  
, builder, deceased, died a widower and intestate.

That I am the lawful attorney of E.B., the natural and lawful son, and one of the next of kin of the said deceased.

That the said E.B. is now residing in the State of California, one of the United States of America; that I will faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of his estate according to law for the use and benefit of the said E.B., and until he shall apply for and obtain letters of administration of the said estate, and that I will exhibit under oath a true and perfect inventory (*etc., as in the last form*).

## 68. OATH OF ADMINISTRATOR (THE DEATH OF THE INTESTATE BEING PRESUMED.)

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of  
widow, make oath and say:—

That A.B., late of the of , in the County of  
, merchant, deceased, died in or since the year 19 , a bachelor without father and intestate; I am unable to depose as to the place of his death.

That on the day of , 19 , by an order on motion in the said Court, it was ordered that on an application being made for letters of administration of the estate of the said

intestate, the death of the said deceased may be sworn to have occurred in or since the year 19      aforesaid.

That I am the natural and lawful mother and only next of kin of the said deceased, and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

---

69. OATH OF ADMINISTRATOR (THE FORMER GRANT HAVING BEEN REVOKED).—

In the Surrogate Court of the County of      .

In the estate of A.B., deceased.

I, C.D., of the      of      , in the County of      ,  
saddler, make oath and say :—

That A.B., late of the      of      , in the County of      , harness maker, deceased, died intestate, a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece.

That, notwithstanding the premises, letters of administration of the estate of the said deceased were, on the      day of      , 19      , granted out of the said Court to E.F., the lawful second cousin of the said deceased, on the suggestion that the said deceased died intestate, a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece, cousin german, or cousin german once removed; and that the said E.F. was one of the next of kin of the said deceased.

That the said letters of administration have been since voluntarily brought in by or on behalf of E.F., and have been duly revoked and declared null and void.

That I am the lawful cousin german, and one of the next of kin of the said deceased; that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).



70. OATH OF GUARDIAN ADMINISTERING FOR THE USE OF A MINOR.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ ,  
wine merchant, make oath and say:—

That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_ , in the County of \_\_\_\_\_ , innkeeper, died a widower and intestate, leaving E.B. and F.B., his natural, lawful and only children and only next of kin, who are now in their minority, to wit: the said E.B., of the age of \_\_\_\_\_ years and upwards, and the said F.B., of the age of \_\_\_\_\_ years and upwards, but severally under the age of twenty-one years.

That there is no testamentary or other lawfully appointed guardian of the said minors, and that I am the lawful and next of kin of the said E.B. and F.B., who have by an instrument in writing under their hands bearing date the day of \_\_\_\_\_ , 19 \_\_\_\_\_ , elected me to be their guardian for the purpose of taking letters of administration of the estate of the said deceased for their use and benefit and until one of them shall attain the age of twenty-one years; and that I will faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of his estate according to law for the use and benefit of the said minors until one of them shall attain the age of twenty-one years, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the  
County of \_\_\_\_\_ , the  
day of \_\_\_\_\_ , A.D. 19 \_\_\_\_\_ , be-  
fore me. }

(A person authorized to administer oaths under the Act.)

71. OATH OF GUARDIAN ADMINISTERING FOR THE USE OF AN  
INFANT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
oil operator, make oath and say:—

That the said A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the  
County of \_\_\_\_\_, tailor, died a widower and intestate, leaving  
E.B. and F.B., his natural and lawful children and only next of  
kin, who are now in their infancy, to wit: the said E.B. of the  
age of \_\_\_\_\_ years and upwards, and the said F.B. of the age  
of \_\_\_\_\_ years and upwards, but respectively under the age of  
fourteen years.

That there is no testamentary or other lawfully appointed  
guardian of the said infants, and that I am the lawful  
and next of kin of the said infants and have been duly assigned  
their guardian for the purpose of taking letters of administration  
of the estate of the said deceased for their use and benefit until  
one of them shall attain the age of twenty-one years.

And that I will faithfully administer the property of the de-  
ceased by paying his just debts and distributing the residue, if  
any, of his estate, according to law, for the use and benefit of the  
said E.B. and F.B., until one of them shall attain the age of  
twenty-one years, and that I will exhibit under oath a true and  
perfect inventory of all and singular the property of the said  
deceased and render a just and full account of my administra-  
tion when thereunto lawfully required.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the \_\_\_\_\_  
County of \_\_\_\_\_, the \_\_\_\_\_  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, be-  
fore me.

(A person authorized to administer oaths under the Act.)

72. OATH OF TESTAMENTARY OR OTHER SPECIALLY APPOINTED  
GUARDIAN ADMINISTERING FOR THE USE OF MINORS.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
tailor, make oath and say:—

That the said A.B., late of the of , in the  
County of , widow, deceased, died a widow and intestate,  
leaving E.B. and F.B., her natural and lawful and only children  
and only next of kin her surviving, who are both now in their  
minority, to wit: the said E.B. of the age of years and  
upwards and the said F.B. of the age of years and up-  
wards, but severally under the age of twenty-one years.

That G.B., late of the of , in the County of  
, butcher, deceased, the natural and lawful father of the  
said minors, by his will, dated the day of , and  
proved on the day of , 19 , in the said Court,  
appointed me this deponent to be guardian of his said children.

And that I will faithfully administer the property of the said  
deceased by paying his just debts and distributing the residue, if  
any, of his estate according to law, for the use and benefit of the  
said E.B. and F.B. until one of them shall attain the age of twen-  
ty-one years; and that I will exhibit under oath a true and per-  
fect inventory of all and singular the property of the said de-  
ceased, and render a just and full account of my administration  
when thereunto lawfully required.

Sworn at the  
of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(A person authorized to administer oaths under the Act.)



That A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, bricklayer, deceased, died intestate a bachelor, leaving E.B., his natural and lawful father and next of kin him surviving.

That the said E.B. is now a lunatic.

That no committee has been appointed of the estate of the said E.B., nor has any order been made entrusting the custody of his estate to any person.

That I am the lawful grandson and one of the next of kin of the said E.B.

That I will faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of the said estate according to law, for the use and benefit of the said E.B. during his lunacy, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the  
County of \_\_\_\_\_, the \_\_\_\_\_  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, be-  
fore me.

(A person authorized to administer oaths under the Act.)

75. OATH FOR CESSATE ADMINISTRATION TO CHILD ON ATTAINING HIS MAJORITY.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_,  
 auctioneer, make oath and say:—



That A.B., late of the                      of                      , in the County of                      , insurance agent, deceased, died a widower and intestate.

That on the                      day of                      , 19                      , letters of the estate of the said deceased were granted by the said Court to E.F., the lawful uncle and next of kin and guardian lawfully assigned to me this deponent then an infant (or the guardian duly elected by me the deponent then fourteen years of age) the natural and lawful and only child and only next of kin of the said deceased for my benefit and until I should attain the age of twenty-one years.

That on the                      day of                      , 19                      , I attained the age of twenty-one years, by reason of which the said letters of administration have ceased and expired.

That I am the natural and lawful child and only next of kin of the said deceased.

That I faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of the estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration whenever thereunto lawfully required.

Sworn at the                      of                      in the                      County of                      , the                      day of                      , A.D. 19                      , before me.

*(A person authorized to administer oaths under the Act.)*

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76. OATH FOR CESSATE ADMINISTRATION, THE FORMER ADMINISTRATOR HAVING DIED.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      , teamster, make oath and say:—

That A.B., wife of me the said C.D., of the                      of                      , in the County of                      , died on or about the                      day of                      , 19                      , at                      , intestate; that on the                      day of                      , 19                      , letters of administration of the estate of the said deceased were granted out of the said Court to E.F., the lawful attorney of me this deponent, the lawful husband of the said deceased, I then residing in Jamaica, for my use and benefit and until I should duly apply for and obtain letters of administration of the said estate.

That the said E.F. died on the                      day of                      , 19                      , by reason of which the said letters of administration have ceased and expired; that I am the lawful husband of the said deceased; and that I will faithfully administer the property of the said deceased by paying her just debts and distributing the residue, if any, of her estate according to law; that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and full account of my administration when thereunto lawfully required.

Sworn at the                      of                      in the                      County of                      , the                      day of                      , A.D. 19                      , before me.

*(A person authorized to administer oaths under the Act.)*

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77. OATH FOR CESSATE ADMINISTRATION AFTER A GRANT PENDENTE LITE, THE SUIT HAVING ENDED.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      in the County of                      , gardener, make oath and say:—



a marriage was intended to be had and solemnized between the said E.F. and G.H., it was witnessed that the said A.B., his executors, administrators and assigns, should stand possessed of and interested in the sum of                      dollars upon trust, after the solemnization of the said intended marriage, to pay the interest, dividends and annual product of the said sum to the said G.H. for and during her life and after her decease to the said E.F. during his life and after the decease of the survivor of them in trust for all and every or such one or more exclusively of the other or others of the children of the said G.H. by the said E.F. as she the said G.H. should by deed or will appoint, and in default of such appointment in trust for all and every the children and child of the said E.F. and G.H. who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain the said age or marry, as therein mentioned, and if there should be but one such child the whole to be in trust for that one child, his or her executors or administrators, and it is provided in and by the said indenture that if the said A.B. should depart this life or decline to act in the trusts thereby created, it should be lawful for the said E.F. and G.H. and the survivor of them to appoint a trustee in the room of the said trustee so dying or refusing or declining to act, for the purpose of the said indenture (as by the said indenture more fully appears).

And I further make oath and say, that the said intended marriage was afterwards, duly had and solemnized by the said E.F. and G.H. and there is issue of the said marriage one child only who has attained the age of twenty-one years.

That the said G.H. died on the                      day of                      , 19    , in the lifetime of her husband, intestate, and without having appointed the said trust estate or any part thereof by deed or otherwise.

That the said A.B., deceased, died on or about the                      day of                      , 19    , having made and duly executed his last will and testament bearing date the                      day of                      , 19    , and therein appointed I.K. sole executor and residuary legatee

and devisee and that the said I.K. has renounced probate and execution of the said will.

And I further make oath and say that the said E.F. under and by virtue of the power vested in him by the said indenture of settlement, hath by a certain deed of appointment dated the            day of            , 19    , nominated, constituted and appointed L.M. of            to be trustee in the room of the said A.B., deceased, for all the purposes of the said in part recited trust.

And I further make oath and say, that the said L.M. has by an instrument under his hand and seal authorized me this deponent to procure letters of administration of the personal estate of the said A.B., deceased, to be granted to me as a person named by him for that purpose and on his behalf, limited so far only as concerns the right, title and interest of him, the said deceased in and to the said sum of            dollars, etc., and all dividends and interest due and to become due thereon, and for transferring the said sum into the names of the said L.M. and N.O. for the purpose of carrying into effect the trusts of the said indenture of settlement of the day of            , 19    , but no further or otherwise.

And that I will faithfully administer the property of the said deceased for the use and benefit of the said L.M., limited as aforesaid.

And that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at the

of	in the	}
County of	, the	
day of	, A.D. 19    , be-	
fore me.		

*(A person authorized to administer oaths under the Act.)*



79. OATH FOR ADMINISTRATION LIMITED TO TRUST PROPERTY.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, printer, make oath and say:—

That E.F., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, by her will gave, devised and bequeathed the whole of her real estate and the residue of her personal estate unto G.H. and A.B., their executors, administrators and assigns, upon trust to convert the same into money and to invest the proceeds thereof as by the said indenture directed, and to pay the interest and dividends therefrom to I.K. and L.M. during their natural life and the life of the survivor of them, and upon the decease of such survivor to pay the principal unto her grandson, me this deponent, and of her said will appointed the said A.B. and G.H. executors, who have proved the same in the said Court on the \_\_\_\_\_ day of \_\_\_\_\_.

That the said G.H. and A.B., in execution of the aforesaid trust, converted the said real estate and residue of the said personal estate into money and invested the same in the purchase of debentures of \_\_\_\_\_ loan company, which debentures stand in the name of the said G.H. and A.B.

That the said sum of \_\_\_\_\_ dollars still remains standing in the name of the said G.H. and A.B., or in the name of the said A.B., as the survivor, in the account thereof in the books of the said company; but that neither the said A.B. or G.H. had any beneficial interest whatever therein or in any part thereof, or in the said dividends and interest thereof.

And I further make oath and say that the said A.B., late of \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, survived the said G.H., and died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, aforesaid, intestate, a widower, leaving him surviving E.B. and F.B., his natural and lawful and only children and only next of kin, the only persons entitled in distribu-

tion to his personal estate, who have in and by a certain instrument in writing under their respective hands and seals consented that letters of administration of the estate of the said A.B., deceased, may be committed and granted to me under the limitations hereinafter mentioned.

That no letters of administration of the said estate have as yet been granted.

And I further make oath and say that I am the administrator with the will annexed of the estate of the said E.F., deceased, left unadministered by the said G.H. and A.B. (both since dead), and that I will faithfully administer the property of the said A.B., deceased, by distributing the same according to law, limited so far only as concerns all the right, title and interest of him, the said deceased, in and to the aforesaid sum of                      dollars, etc., and the dividends or interest due or to grow due thereon, but no further or otherwise; and that I will exhibit under oath a true and perfect inventory of all and singular the said property of the said deceased, limited as aforesaid, and render a just and full account of my administration whenever thereunto lawfully required.

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19                      , be-  
 fore me.                      }

*(A person authorized to administer oaths under the Act.)*

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80. OATH FOR ADMINISTRATION LIMITED TO A POLICY OF ASSUR-  
 ANCE.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
 coal dealer, make oath and say:—

That the said A.B., late of the                      of                      , in the County of                      , spinster, deceased, died intestate without parent, brother or sister, leaving E.F., her lawful uncle and only next of kin, who has duly renounced letters of administration of the estate of the said deceased.

That in the year 19                      I lent the said deceased various sums of money, and that by a certain policy of assurance bearing date the                      day of                      , 19                      , issued by the                      Life Assurance Company, the sum of                      dollars was assured to be paid to the executors, administrators or assigns of the said A.B., together with such further sum or sums as should have been appropriated as bonuses to the said policy after proof being given of her death as in the said policy mentioned.

That the said assurance was effected in the name of the said A.B., but that the same was so effected at the instance of me, the said C.D.; that although the said policy was never legally assigned to me, the same was never in the possession of the said A.B., but was delivered to me as my own property and effects, and is now in my possession; and the premiums thereon were from the month of                      , 19                      , to the death of the said deceased paid by me.

That I am the sole person equitably entitled to the said policy and to the money secured thereby, but that I am unable to obtain payment thereof for want of a legal personal representative of the said deceased.

That I will faithfully administer the property of the said deceased, limited so far only as concerns all the right, title and interest of her, the said deceased, in and to the aforesaid policy of assurance numbered                      in the said Life Assurance Company, for the said sum of                      dollars secured thereby, and all profits, bonuses and accumulations thereon, and all benefit and advantage thereunder, but no further or otherwise, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased, limited as aforesaid,

and render a just and true account of my administration when thereunto lawfully required.

Sworn at the  
                   of                   in the  
 County of                   , the  
 day of                   , A.D. 19   , be-  
 fore me.                   }

*(A person authorized to administer oaths under the Act.)*

81

## OATH FOR ADMINISTRATION AD COLLIGENDA.

In the Surrogate Court of the County of                   .

In the estate of A.B., deceased.

I, J.W.C., of the                   of                   , in the County of                   ,  
 banker, make oath and say:—

That A.B., late of the                   of                   , in the County of                   ,  
                   , died on or about the                   day of                   , at                   ,  
 intestate, a bachelor without parent, leaving, as I believe, two  
 natural and lawful sisters and only next of kin, whose names  
 and addresses are unknown to me.

That as a member of the firm of C. & Co., bankers, I am a  
 creditor of the said deceased.

That by an order on motion made in this matter on the  
 day of                   , 19   , it was ordered by the said Court that let-  
 ters of administration of the estate of the said deceased be  
 granted to me, the said J.W.C., under the limitations hereinafter  
 named.

That I will faithfully administer the personal property of the  
 said deceased limited for the purpose only of collecting and get-  
 ting in and receiving the personal estate and doing such acts as  
 may be necessary for the preservation of the same during the ab-  
 sence of the person or persons entitled by law to the said estate  
 and until they shall apply for and obtain letters of administration  
 of the same, but no further or otherwise; and that I will exhibit

under oath a true and perfect inventory of all and singular the personal property of the said deceased, and render a just and true account of my administration when thereunto lawfully required.

Sworn at the

County of                      of                      in the  
day of                      , the  
fore me.                      , A.D. 19                      , be-

*(A person authorized to administer oaths under the Act.)*

82. OATH FOR LIMITED ADMINISTRATION UNDER THE 59TH SECTION OF THE SURROGATE COURTS ACT. (See Rule 13.)

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
confectioner, make oath and say:—

That the said A.B., late of the                      of                      , in the  
County of                      , grocer, deceased, died on or about the  
day of                      , at                      , a widower and intestate, leaving him  
surviving E.B. and F.B. and G.B., his natural and lawful and  
only children and only next of kin, the only persons entitled in  
distribution to his estate.

That the said E.B. and F.B. have respectively duly renounced  
all their right and title in and to the letters of administration of  
the estate of the said estate.

That the said G.B. left this country in the year 19                      , and has  
not since been heard of.

That on the                      day of                      , 19                      , the said Court ap-  
pointed me this deponent to be the administrator of the estate  
of the said deceased under and by virtue of the 59th section of  
the Surrogate Courts Act.



That I will faithfully administer the property of the said deceased by paying his just debts and distributing the residue, if any, of his estate, according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19    , be-  
 fore me.                      }

*(A person authorized to administer oaths under the Act.)*

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83. OATH FOR ADMINISTRATION (WITH THE WILL ANNEXED) TO  
 THE RESIDUARY LEGATEE.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.B., of the                      of                      , in the County of                      ,  
 widow, make oath and say:—

That I believe this paper writing hereto annexed to contain the true and original last will and testament of A.B., late of the                      of                      , in the County of                      , reporter, deceased.

That the said deceased did not in his said will name any executor.

That I am the lawful widow and relict of the said deceased, and the residuary legatee named in his said will, and that I will faithfully administer the property of the said deceased according to the tenor of his will by paying his just debts and the legacies contained in his will so far as the same shall thereunto extend and the law bind me, and by distributing the residue, if any, of the

estate according to law and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration when thereunto lawfully required.

Sworn at the  
                     of                      in the  
 County of                      , the  
 day of                      , A.D. 19    , be-  
 fore me.                      }

*(A person authorized to administer oaths under the Act.)*

The administrator, if not sworn to the original will, may be sworn to the probate or a certified office copy of the will. The words "and original" should then be omitted.

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84. OATH FOR ADMINISTRATION TO CREDITOR WITH WILL ANNEXED.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
 merchant, make oath and say:—

That I believe the paper writing hereto annexed to contain the original last will and testament of A.B., late of the  
 of                      , in the County of                      , carter, deceased.

That E.B. and F.B., the lawful sons of the said deceased, the executors and residuary legatees in trust and the residuary legatees named in the said will, have duly renounced probate and execution of the said will.

That I am a creditor of the said deceased and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

## 85. OATH FOR ATTORNEY OF EXECUTOR.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, post master, make oath and say:—

That I believe this paper writing hereto annexed to contain the true and original last will and testament of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, postman, deceased, and that E.F., the sole executor named therein resides at \_\_\_\_\_, in the State of California, one of the United States of America.

That I am the lawful attorney of the said E.F.

That I will faithfully administer the property of the said deceased according to the tenor of the will, for the use and benefit of the said E.F., and until he shall duly apply for and obtain probate of the said will, by paying the testator's just debts and the legacies contained in his will so far as the same shall thereunto extend and the law bind me, and distributing the residue, if any, of the said estate according to law and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said testator and render a just and true account of my administration when thereunto lawfully required.

Sworn at the

_____	of	_____	in the
County of	_____	, the	}
day of	_____	, A.D. 19	
fore me.	_____	, be-	

*(A person authorized to administer oaths under the Act.)*

## 86. OATH OF COMMITTEE OF A LUNATIC EXECUTOR.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, farmer, make oath and say:—

That I believe the paper writing hereto annexed to contain the true and original last will and testament of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, physician, and that E.F., the sole executor therein named is a lunatic confined in the Provincial Lunatic Asylum at the City of Toronto, in the County of York; and by an order of the High Court of Justice bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, I this deponent was appointed committee of the estate of the said lunatic; and that I will faithfully administer the property of the said deceased according to the tenor of his will for the use and benefit of the said E.F., and until he shall become of sound mind, by paying the just debts of the testator and the legacies contained in his will so far as the same shall thereunto extend and the law bind me, and by distributing the residue, if any, of the estate according to law; and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said testator and render a just and true account of my administration when thereunto lawfully required.

Sworn at the \_\_\_\_\_ of \_\_\_\_\_ in the }  
County of \_\_\_\_\_, the }  
day of \_\_\_\_\_, A.D. 19\_\_\_\_, be- }  
fore me.

*(A person authorized to administer oaths under the Act.)*

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87. OATH FOR ADMINISTRATION WITH THE WILL ANNEXED UNDER THE 59TH SECTION OF THE SURROGATE COURTS ACT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

I, C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, cattle dealer, make oath and say:—

That I believe the paper writing hereto annexed to contain the true and original last will and testament of A.B., late of the  
of , farmer, deceased, and that E.F., the executor therein named is now residing out of the Province of Ontario at the City of Chicago in the State of Illinois.

That I am a creditor of the said deceased.

That on the            day of            , 19    , I was appointed by the said Court by order thereof to be the administrator with the will annexed of the estate of the said deceased under and by virtue of the 59th section of the Surrogate Courts Act, and that I will faithfully administer the property of the said deceased (*etc., as in the ordinary form*).

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88. OATH FOR LIMITED ADMINISTRATION TO ATTORNEY OF ADMINISTRATOR IN THE TESTATOR'S FOREIGN DOMICILE.

In the Surrogate Court of the County of            .

In the estate of A.B., deceased.

I, J.S., of the            of            , in the County of            , banker, make oath and say:—

That A.B., late of the City of Madrid, in Spain, deceased, died on or about the            day of            , 19    , intestate, domiciled in Spain.

That by an order of the Court of First Instance at Madrid, being the Court of Domicile of the said deceased, E.B., a son of the said deceased was appointed administrator of the estate of the said deceased.

That the said E.B. now resides at the City of Madrid in Spain, and that the said deceased died possessed of a certain mortgage for \$2,000 and interest thereon upon lot number            in the ninth concession of the Township of Sarnia in the County of Lambton.



That I am the lawfully appointed attorney of the said E.B. for the purpose only of administration of the estate of the said A.B., limited only to receiving the moneys payable under the said mortgage and of duly discharging or otherwise releasing the same upon payment thereof, and of enforcing the same.

That I will faithfully administer the property of the said deceased, limited so far only as concerns all the right, title and interest of the deceased in and to the said mortgage and to the said lands therein comprised and the said moneys payable thereunder, and all benefits and advantage to be had and received therefrom, but no further or otherwise, for the use and benefit of the said E.B. and until he shall duly apply for and obtain letters of administration of the estate of the said A.B., deceased, by paying the just debts of the said A.B., deceased, and distributing the residue, if any, of his estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased and render a just and true account of my administration whenever thereunto lawfully required.

Sworn at the				} (Sgd.) J. S.
of		in the		
County of		, the		
day of		, A.D. 19	, be-	
fore me.				

*(A person authorized to administer oaths under the Act.)*

---

89. OATH FOR CESSATE ADMINISTRATION TO RESIDUARY LEGATEE  
ON HIS COMING OF AGE.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
grocer, make oath and say:—

That I believe the paper writing hereto annexed to contain

the true and original last will and testament of A.B., late of the  
of , in the County of , clerk, deceased,  
whereby the said A.B. appointed his son E.B. executor and me  
this deponent residuary legatee.

That the said E.B. heretofore renounced probate of the said  
will, and on the day of , letters of administration with  
the said will annexed, of the estate of the said deceased were  
granted out of the said Court to G.D., my lawful uncle and next  
of kin and the guardian lawfully assigned to me, the said C.D.,  
then an infant, for my use and benefit, limited until I should at-  
tain the age of twenty-one years.

That on the day of , 19 , I attained  
the age of twenty-one years, by reason of which the said let-  
ters of administration with the said will annexed have ceased and  
expired.

That I am the residuary legatee named in the said will, and  
that I will faithfully administer the property of the said deceased  
according to the tenor of his will (*etc., as in Form No. 16*).

90. OATH FOR ADMINISTRATION DE BONIS NON TO INTESTATE'S  
CHILD.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
coachman, make oath and say:—

That A.B., late of the of , in the County of  
, deceased, died on or about the day of ,  
19 , at , intestate.

That on the day of , 19 , letters of admin-  
istration of his estate were granted out of the said Court to E.B.,  
his lawful widow and relict, who died on the day of  
, 19 , leaving part of the said estate unadministered;  
and that I am the natural and lawful son and one of the next of  
kin of the said A.B., deceased.

That I will faithfully administer the unadministered property of the said deceased by paying his just debts and distributing the residue, if any, of his estate according to law; and that I will exhibit under oath a true and perfect inventory of all and singular the property of the said deceased left unadministered as afore-said, and render a just and true account of my administration whenever thereunto lawfully required.

Sworn at the  
of in the  
County of , the  
day of , A.D. 19 , be-  
fore me.

(Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

---

91. OATH FOR ADMINISTRATION DE BONIS NON TO INTESTATE'S NIECE.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
widow, make oath and say:—

That A.B., late of the of , in the County of  
, deceased, died a bachelor, without parent, brother or  
sister, and intestate.

That on the of , 19 , letters of administra-  
tion of the estate of the said deceased were granted out of the  
said Court to E.F., the lawful nephew and one of the next of kin  
of the said deceased.

That the said E.F. died on the day of , 19 ,  
leaving part of the said estate unadministered.

That I am the lawful niece and one of the next of kin of the  
said deceased; that I will faithfully administer (*etc., as in the  
last form*).

92. OATH FOR ADMINISTRATOR DE BONIS NON TO REPRESENTATIVE  
OF INTESTATE'S COUSIN.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
 , make oath and say:—

That A.B., late of the of , in the County of  
 , deceased, died a bachelor, without parent, brother or  
sister, uncle or aunt, nephew or niece, and intestate.

That on the day of , 19 , letters of admin-  
istration of the estate of the said deceased were granted out of  
the said Court to E.F., the lawful cousin german and only next  
of kin of the said deceased.

The said E.F. died on the day of , 19 ,  
leaving part of the said estate unadministered.

That I am the administrator of the estate of the said E.F.

That I will faithfully administer the unadministered prop-  
erty (*etc., as in Form No. 90*).

93. OATH FOR ADMINISTRATION DE BONIS NON, THE PERSON FOR  
WHOSE USE THE ORIGINAL GRANT WAS MADE HAVING DIED.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
builder, make oath and say:—

That A.B., late of the of , in the County of  
 , deceased, died a bachelor, without parent,  
brother or sister, uncle or aunt, nephew or niece, and intestate,  
leaving him surviving E.F., his lawful cousin german and only  
next of kin, who was then, and until the time of his death con-  
tinued to be, a lunatic or person of unsound mind.

That on the                      day of                      , 19    , letters of administration of the estate of the said deceased were granted out of the said Court to me, this deponent, the lawful son and one of the next of kin of the said E.F., for his use and benefit during his lunacy.

That the said E.F. died on the                      day of                      , 19    , and that part of the said estate of the said A.B. remains unadministered.

That I am the administrator of the estate of the said E.F., deceased, under letters of administration granted to me out of the said Court on the                      day of                      , 19    .

And I further make oath and say that I will faithfully administer (*etc., as in Form No. 90*).

---

94. OATH FOR ADMINISTRATION DE BONIS NON WITH THE WILL  
ANNEXED.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

I, C.D., of the                      of                      , in the County of                      ,  
spirit merchant, make oath and say:—

That I believe the paper writing hereto annexed to contain the true and original last will and testament of A.B., late of the  
of                      , in the County of                      .

That on the                      day of                      , 19    , probate of the said will was granted out of the said Court to E.B., the brother of the said deceased, the sole executor named in the said will, who died on the                      day of                      , 19    , intestate, leaving part of the estate of the said testator unadministered.

That I am the son of the residuary legatee named in the said will of the said A.B., deceased; and that I will faithfully administer all the unadministered property of the said deceased according to the tenor of his will by paying his just debts and the lega-



cies contained in his will so far as the same shall thereunto extend and the law bind me, and distributing the residue, if any, of the estate according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the unadministered property of the said testator, and render a just and true account of my administration when thereunto lawfully required.

Sworn at the	}	
of		in the
County of		, the
day of		, A.D. 19
fore me.		(Sgd.) C. D.

*(A person authorized to administer oaths under the Act.)*

# 95. OATH FOR ADMINISTRATION CÆTERORUM.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
solicitor, make oath and say:—

That A.B., wife of me, the said C.D., of the of ,  
in the County of , , deceased, died on  
the day of , 19 , at , having by virtue  
of certain powers and authorities vested in her by an indenture of  
settlement bearing date the day of , 19 , made  
between , made and executed her last will and testament  
bearing date the day of , 19 , and thereof ap-  
pointed and executors.

That on the day of , 19 , probate of the said  
will, limited so far as concerns all such personal estate as she, the  
said deceased, by virtue of the said indenture, has a right to ap-  
point and dispose of, and has in and by her said will appointed  
and disposed of accordingly, but no further or otherwise, was  
granted by authority of this division to the said (executors).

That the said deceased died possessed of other personal estate over which she had no disposing power, and concerning which she died intestate.

That I am the lawful husband of the said deceased.

That I will faithfully administer the rest of the property of the said deceased by paying her just debts and distributing the residue, if any, of her estate according to law; that I will exhibit under oath a true and perfect inventory of all and singular the rest of the property of the said deceased and render a just and full account of my administration when thereunto lawfully required.

Sworn at the				
	of		in the	
County of		, the		(Sgd.) C. D.
day of		, A.D. 19	, be-	
fore me.				

*(A person authorized to administer oaths under the Act.)*

96. OATH FOR ADMINISTRATION CÆTERORUM AFTER LIMITED ADMINISTRATION OF NEXT OF KIN.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

I, C.D., of the of , in the County of ,  
make oath and say:—

That the said A.B., late of the of , in the County of , deceased, died a bachelor, leaving E.F., his natural and lawful father and next of kin.

That the said E.F. duly renounced letters of administration of the estate of the said deceased; and that on the day of , 19 , letters of administration of the estate of the said deceased, limited to the purpose only to become and to be made a

party to a certain action then depending in the High Court of Justice between G.H., plaintiff, and I.K., defendant, and to attend, supply, substantiate and confirm the proceedings then already had, or that should or might thereafter be had therein, or in any other cause or suit which might be commenced in the said Court or in any other Court between the before-named parties or any other party touching or concerning the matters at issue in the said action, and until a final decree should be had and made therein, and the said decree carried into execution and the execution thereof fully completed, but no further or otherwise, were granted out of the said Court to L.M., as a person for that purpose named by and on behalf of the said G.H.

That the said litigation has wholly ended, whereby the said administration has ceased and expired.

And I further make oath and say that the said E.F. is dead, and that on the                      day of                      , 19                      , letters of administration of his estate were granted out of the Surrogate Court of the County of                      , to me this deponent; and that I will faithfully administer all the rest of the property of the said A.B., deceased, by paying his just debts and distributing the residue, if any, of his estate, according to law, and that I will exhibit under oath a true and perfect inventory of all and singular the rest of the property of the said deceased as aforesaid, and render a just and true account of my administration when thereunto lawfully required.

Sworn at the	}	(Sgd.)	C. D.	
of				in the
County of                      , the				
day of                      , A.D. 19                      , be-				
fore me.				

*(A person authorized to administer oaths under the Act.)*

97. PETITION—OATH, ETC., WHEN TRUST COMPANY IS EXECUTOR  
OR ADMINISTRATOR.

The petition is made by the trust company, and is signed either by the manager under the seal of the company, or by the solicitor on behalf of the trust company.

The oath of the executor or administrator is made by the manager and is to the effect that the Trust Company will faithfully administer, etc.

---

98. PROOF IN SOLEMN FORM.

For the prayer of the petition in common form substitute:—

Wherefore your petitioner prays that the said will may be proved in solemn form and that probate thereof may thereupon be granted to him by this Honourable Court.

---

99. JUDGE'S ORDER.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Between

, plaintiff, and  
, defendants.

1. Upon the application of the plaintiff to prove the will of the said in solemn form, upon reading the petition of the plaintiff and the affidavits of the plaintiff and of filed herein it is ordered that

2. A copy of the said petition and of this order be served upon each of the said defendants who are the next of kin of the deceased (or as the case may be).

3. In case any of the said defendants desire to dispute the validity of the said will or to attend and examine the witnesses to

the execution thereof, he or they do cause an appearance to be entered for him or them in the office of the Registrar of this Court at the Town of \_\_\_\_\_, in the County of \_\_\_\_\_ with-  
in ten days after such service as aforesaid upon him or them.

4. In case none of the said defendants enter an appearance herein, the said plaintiff shall proceed to prove the said will in solemn form before me at the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, on \_\_\_\_\_ day the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, and in the event of any of the said defendants entering an appearance herein the plaintiff and such defendants so appearing shall attend before me in person or by their solicitors at the time and place aforesaid to receive directions for further proceedings in the said action.

5. The costs of this application and order are reserved to be disposed of at the trial or other disposition of this action.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

.....  
Surrogate Judge.

100.

#### PROCEDURE ORDER.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff, and  
\_\_\_\_\_, defendants.

Upon the application of the plaintiff; upon reading the affidavit of the plaintiff filed herein, whereby it appears that the defendants have entered an appearance to the order of citation herein, and the affidavit of \_\_\_\_\_, one of the defendants, and upon hearing counsel for the respective parties, it is ordered:—



1. That the plaintiff do within                      from this date file and serve a statement of claim.

2. That the defendants do within eight days after the filing and service of the statement of claim, file and serve their statement of defence thereto, and after the delivery of such statement of defence the plaintiff shall be entitled within                      thereafter to file and serve a reply or joinder of issue.

3. That any party hereto may after the said statement of defence has been delivered, or the plaintiff may after the time for delivery of the same has expired, obtain an order for production according to the rules and practice of the High Court of Justice, such order to be issued by the Registrar of the said Court under the seal thereof on *praecipe*.

4. That the plaintiff may after the service of the statement of defence as aforesaid, and the defendants or any of them may after the time for delivery thereof has expired, upon *praecipe* order to be issued by the Registrar of the said Court, be orally examined before the said Registrar, at such time and place as he shall appoint for discovery under and pursuant to the rules and practice of the High Court of Justice in that behalf.

5. That either party shall be entitled to obtain the production and inspection of documents from the opposite party or parties in the same manner and to the same extent as in an action in the High Court of Justice and under the Rules and practice of the High Court.

6. That either party may call upon the other to admit any documents, saving all just exceptions, in the same manner as in an action of the High Court of Justice and under the rules and practice thereof.

7. That after issue joined either party may upon notice apply for and obtain an order for the trial of this action at a time to be fixed by such order, and the said order shall be served upon all parties entitled to notice of such trial ten days before the trial thereof in the same way and with the same effect as notice of trial

is served in an action in the High Court and subject to the rules and practice of the High Court.

8. That either party may apply upon two clear days' notice to the other for such further or other directions as may be necessary for the proper conduct or trial of this action.

9. That the costs of and incidental to this application and of and incidental to any matter or proceeding hereinbefore authorized, directed or ordered, shall be costs in the cause unless otherwise ordered.

Dated the                      day of                      , 19   .

.....

Surrogate Judge.

Tax a counsel fee  
of

\_\_\_\_\_

101.

# APPEARANCE.

In the Surrogate Court of the County of                      .  
In the estate of A.B., deceased.

Between

                    , plaintiff,    and  
                    , defendants.

Enter an appearance for (giving the names of all the defendants for whom appearance is to be entered) in this action.

Dated the                      day of                      , 19   .

(Sgd.)

Defendant or his Solicitor.

Address,

102. STATEMENT OF CLAIM—ADMINISTRATION.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Between

R.S., plaintiff,

and

C.D., defendant.

Statement of Claim.

1. The plaintiff is cousin german and one of the next of kin of A.B., late of the of , in the County of (addition), who died on or about the day of , A.D. 19 , a widower, without child, parent, brother or sister, uncle or aunt, nephew or niece.

2. The plaintiff claims a grant to him of letters of administration of the property of the said deceased.

Delivered this day of , A.D. 19 , by E.F., of , solicitor for plaintiff.

103. STATEMENT OF CLAIM—PROBATE.

(Formal Parts as in Form No. 102.)

1. The plaintiff is the executor appointed under the will of A.B., late of the of , in the County of (addition), who died on or about the day of , A.D. 19 .

2. The said will bears date the day of , A.D. 19 , and a codicil thereto bears date the day of , A.D. 19 .

3. The plaintiff claims that the Court shall decree probate of the said will and codicil in solemn form of law.

Delivered, etc.

#### 104. STATEMENT OF CLAIM—REVOCATION OF ADMINISTRATION.

(Formal Parts.)

1. The plaintiff claims that the grant of letters of administration of the property of the said deceased, obtained by M.N., the defendant, should be revoked, and probate of the said will granted to the plaintiff.

Delivered, etc.

105. STATEMENT OF CLAIM—REVOCATION OF PROBATE.

(Formal Parts.)

1. The plaintiff claims to be executor, etc. (as in Form No 104), and to have the probate of a pretended will of the said deceased, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, granted by this Court, revoked.

Delivered, etc.

106. ORDER FOR ATTENDANCE OF WITNESSES.

In the Surrogate Court of the County of

In the estate of A.B., deceased.

## Between

C.D., plaintiff,

and

E.F., G.H. and I.J., defendants.

Upon the application of C.D., and upon reading the statement of claim and statement of defence filed herein, it is ordered:—

That L.M., N.O. and P.Q. do attend before me at my Chambers in the Court House at the Town of \_\_\_\_\_, in the County of \_\_\_\_\_, on \_\_\_\_\_ day the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_ in the \_\_\_\_\_ noon to give evidence on behalf of the

plaintiff and do bring with them and produce at the time and place aforesaid

Dated this                      day of                      , 19     .

Judge.

(Seal)

107. ORDER OF JUDGE OF SURROGATE COURT FOR ISSUE OF GRANT  
OF LETTERS OF ADMINISTRATION OR PROBATE.

In the Surrogate Court of the County of \_\_\_\_\_

In the estate of A.B., deceased.

Upon reading the application of C.D., and the affidavits and papers filed in support thereof, and the report of the Registrar thereon, I do order that letters of administration (or probate) issue to the applicant.

Dated at Chambers this                      day of                      , 19     .

Surrogate Judge.

108. ORDER APPOINTING AN ADMINISTRATOR AD LITEM.

(Rule 195.)

In the Surrogate Court of the County of \_\_\_\_\_.

(Name of Judge.)

(Name of Judge.)

In Chambers (Date.)

Between

A.B., plaintiff,

and

C.D., defendant.

Upon the application of (the plaintiff) and upon reading the affidavits of \_\_\_\_\_, filed, and upon hearing counsel for \_\_\_\_\_:



1. It is ordered that \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_ (occupation), be and he is hereby appointed to represent action, and that the administration of the real and personal estate and effects, rights and credits of the said \_\_\_\_\_, in his lifetime of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_ (occupation), deceased, who died at \_\_\_\_\_, in the County of \_\_\_\_\_ aforesaid, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and who at the time of his death had a fixed place of abode at \_\_\_\_\_, be and the same is hereby granted to the said \_\_\_\_\_, limited for the purpose only of attending supplying, substantiating and confirming the proceedings already had or which may hereafter be had in this action; and to obey and carry into execution all orders and directions of this Court relating to this action until judgment shall be entered herein and the same carried into execution, and the execution thereof fully completed, but no further or otherwise or in any other manner whatsoever.

*Add if necessary:* 2. And it is further ordered that the giving of security by the said administrator for the due fulfilment of his duties as such administrator be and the same is hereby dispensed with.

---

109. ORDER OF CITATION BY CREDITOR AGAINST NEXT OF KIN, IF ANY.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff,

and

\_\_\_\_\_, defendant.

Upon the application of C.D., and upon reading the affidavit of C.D. filed herein, whereby it appears that A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, painter, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, at the \_\_\_\_\_ of \_\_\_\_\_,

in the County of \_\_\_\_\_, intestate, a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece, cousin german or other known relation, and that the said C.D. is a creditor of the said deceased.

It is ordered that the next of kin, if any, and all other persons having or claiming any interest in the estate of A.B., deceased, do within (one month) after service by publication hereof on them, do cause an appearance to be entered for them in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, at \_\_\_\_\_, and accept or refuse letters of administration of all the estate which by law devolves upon and vests in the personal representative of the said deceased, or shew cause why the same should not be granted to the said C.D.

And it is further ordered that in default of the said next of kin, if any, or any other person having or claiming any interest in the estate of A.B., deceased, so appearing and accepting or extracting the said letters of administration, the said C.D. may proceed to obtain the grant of letters of administration of the said estate notwithstanding the absence of the said next of kin and all other persons having or claiming any interest in the estate of the said A.B., deceased.

Dated at the \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_.

.....

Judge.

#### 110. ORDER OF CITATION TO ACCEPT OR REFUSE PROBATE.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

C.D., plaintiff,

and

G.H., defendant.

Upon the application of C.D., and upon reading the affidavit

of C.D. filed herein, whereby it appears that A.B., of the  
 of                   , in the County of                   , farmer, died on or about  
 the            day of                   , at                   , and that the said A.B.  
 had made and duly executed his last will and testament and  
 thereof appointed G.H. executor, but did not therein name any  
 residuary legatee or devisee, and whereas it further appears by  
 the said affidavit that the said deceased died a bachelor without  
 parent, and that the said C.D. is the natural and lawful brother  
 and one of the next of kin of the said deceased.

It is ordered that the said G.H. within ten days after the ser-  
 vice upon him of this order do appear either personally or by a  
 solicitor and enter an appearance herein in the office of the Sur-  
 rogate Court of the County of                   , at                   , and accept  
 or refuse probate of the said will or shew cause why letters of ad-  
 ministration with the said will annexed of all the estate which by  
 law devolves upon and vests in the personal representative of the  
 said deceased, should not be granted to the said C.D.

And it is further ordered that in default of the said G.H. so  
 appearing and accepting probate of the said will, the said C.D.  
 may proceed to obtain letters of administration with the said will  
 annexed, notwithstanding the absence of the said G.H.

Dated at                   , the                   day of                   , A.D. 19   .

.....

Judge.

#### 111. CITATION TO ACCEPT OR REFUSE ADMINISTRATION.

In the Surrogate Court of the County of                   .  
 In the estate of A.B., deceased.

Between

C.D., plaintiff,  
 and

G.H., defendant.

Upon the application of C.D., and upon reading the affidavit

of C.D. filed herein, whereby it appears that A.B., late of the  
of , in the County of , carpenter, died on  
or about the day of , at the of ,  
in the County of , intestate, a widower without child or  
parent, leaving G.H., his natural and lawful brother his only  
next of kin, and that the said C.D. is the lawful nephew and one  
of the persons entitled in distribution to the estate of the said  
deceased, being the natural and lawful son of , the natu-  
ral and lawful sister of the said deceased, who died in the life-  
time of the said deceased.

It is ordered that the said G.H., within ten days after the  
service upon him of this order do cause an appearance to be en-  
tered for him in the office of the Registrar of the Surrogate Court  
of the County of , at , and accept or refuse let-  
ters of administration of all the estate which by law devolves  
upon and vests in the personal representative of the said de-  
ceased, or shew cause why same should not be granted to the said  
C.D.

And it is further ordered that in default of the said G.H. so  
appearing and accepting and extracting the said letters of ad-  
ministration the said C.D. may proceed to obtain the grant of  
letters of administration of the said estate, notwithstanding the  
absence of the said G.H.

Dated the day of , 19 .

.....

Judge.

112. ORDER OF CITATION BY REPRESENTATIVE OF HUSBAND AGAINST  
HEIR-AT-LAW TO ACCEPT OR REFUSE ADMINISTRATION  
DE BONIS NON.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Between

, plaintiff, and  
, defendant.

Upon the application of C.D., and upon reading the affidavit of C.D. filed herein, whereby it appears that A.B., late of the of , in the County of , blacksmith, died on or about the day of , at the of . in the County of , intestate, and that letters of administration of all the estate which by law devolves upon and vests in the personal representative of the said deceased, were on the day of granted by the said Surrogate Court to B.B., the lawful husband of the said deceased, who for some time intermeddled in the said estate and died on the day of , leaving part thereof unadministered, and that the said C.D. is the personal representative of the said B.B., deceased, letters of administration having been granted to C.D. by the said Court on the day of , and that E.F. is the heir-at-law of the said deceased.

It is ordered that the said E.F. do within ten days after the service upon him of this order cause an appearance to be entered for him in the office of the Registrar of the Surrogate Court of the County of , and accept or refuse letters of administration of the said unadministered estate or shew cause why the same should not be granted to the said C.D.

And it is further ordered that in default of the said E.F. so appearing and accepting and extracting the letters of administration, the said C.D. may proceed to obtain the grant of letters of



Dated the                      day of                      , 19                      .

It is ordered that the said E.F. within ten days after the service upon him of this order do cause an appearance to be entered for him in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, at \_\_\_\_\_, and accept or refuse letters of administration of all the estate which by law devolves upon and vests in the personal representative of the said deceased, or shew cause why the same should not be granted to the said C.D.

And it is further ordered that in default of the said E.F. so appearing and accepting and extracting the said letters of administration, the said C.D. may proceed to obtain the grant of the letters of administration of the said estate, notwithstanding the absence of the said E.F.

Dated the                      day of                      , 19   .

.....

Judge.

---

114. ORDER OF CITATION BY PERSONS CLAIMING LIMITED ADMINISTRATION.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

Between

                    , plaintiff, and  
                    , defendant.

Upon the application of C.D., of the                      of                      , in County of                      , and upon reading the affidavit of E.F., of the                      of                      , in the County of                      , filed in the said Court, whereby it appears that A.B., of the                      of                      , in the County of                      , tinsmith, died on or about the                      day of                      , at the                      of                      , in the County of                      , intestate, a widower, leaving G.H., his natural and lawful son and only next of kin and only person entitled to his estate, and that the said C.D. is the only person beneficially interested in and entitled to the sum of                      dollars with interest due and to become due thereon, secured by an indenture of mortgage upon the following lands and premises:                      which said mortgage was made by I.K. to the said A.B.

It is ordered that the said G.H., within ten days after the service upon him of this order, do cause an appearance to be entered

for him in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, at \_\_\_\_\_, and accept or refuse letters of administration of all the estate which by law devolves upon and vests in the personal representative of the said deceased, or shew cause why letters of administration of the said estate, limited to all the rights, title or interest of the said deceased in and to the said sum of \_\_\_\_\_ dollars, with interest due and to become due thereon, and to the estate and interest of the said A.B. in the said mortgaged lands and premises, should not be granted to the said C.D.

And it is further ordered that in default of the said G.H. so appearing and accepting and extracting the said letters of administration, the said C.D. may proceed to obtain the grant of letters of administration of the said estate limited as aforesaid, or under such other limitations as to the Court shall seem meet, notwithstanding the absence of the said G.H.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_.

.....  
Judge.

115. CITATION TO BRING IN PROBATE (ANOTHER WILL SET UP).

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff, and  
\_\_\_\_\_, defendant.

Upon the application of C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, and upon reading the affidavit of E.F., filed herein, whereby it appears that probate of the original last will and testament of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, painter, deceased, was on the \_\_\_\_\_ day

It is ordered that the said G.H. do within ten days after the service on him of this order bring into and leave in the office of the Registrar of the Surrogate Court of the County of the aforesaid probate in order that the said C.D. may proceed in due course of law for the revocation of the same.

.....

Judge.

In the Surrogate Court of the County of \_\_\_\_\_  
In the estate of A.B., deceased.

, plaintiff, and  
 , defendant.

Upon the application of C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, joiner, and upon reading the affidavit of E.F., filed herein, whereby it appears that probate of the will of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, was in the \_\_\_\_\_ day of \_\_\_\_\_ granted by the Surrogate Court of the County of \_\_\_\_\_, to E.F., one of the executors thereof, the power being reserved of making a like grant to G.H.,

the other executor thereof, and whereby it further appears that the said E.F. some time intermeddled in the estate of the said deceased, and died on or about the                      day of                      , leaving part thereof unadministered, and that on the                      day of                      , probate of the will of the said E.F., deceased, was granted by the Surrogate Court of the County of                      to the said C.D., the sole executor thereof.

It is ordered that the said G.H. do within ten days after service upon him of this order cause an appearance to be entered for him in the office of the Registrar of the Surrogate Court of the County of                      , and accept or refuse probate of the will of the said A.B., deceased.

And it is further ordered that in default of the said G.H. so appearing and accepting and extracting probate of the said will, his right as such executor will wholly cease, and the representation of the said A.B. will devolve as if the said G.H. had not been appointed executor.

Dated at                      , this                      day of                      , A.D. 19                      .

.....

Judge.

\_\_\_\_\_

117. ORDER OF CITATION TO BRING IN PROBATE (INTESTACY ALLEGED).

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

Between

                    , plaintiff, and  
                    , defendant.

Whereas it appears by the affidavit of C.D., of the  
of                      , in the County of                      , engineer, filed herein, that



probate of the original last will and testament of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, was on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, granted to E.F. by the Surrogate Court of the County of \_\_\_\_\_, and that the said deceased died a bachelor, leaving the said C.D., his natural and lawful father and next of kin, and it is alleged in the said affidavit that the said deceased died intestate and that the said probate ought to be called in and revoked and declared null and void in law.

It is ordered that the said E.F. do within ten days after service upon him of this order bring into and leave in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, the aforesaid probate, in order that the said C.D. may proceed in due course of law for the revocation of the same.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_.

.....  
Judge.

---

118. ORDER OF CITATION TO BRING IN ADMINISTRATION (WILL SET UP.)

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff, and  
\_\_\_\_\_, defendant.

Upon the application of C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, physician, and upon reading the affidavit of the said C.D., filed herein, whereby it appears that letters of administration of all the estate which by law devolves upon and vests in the personal representative of A.B., late of the

of \_\_\_\_\_, in the County of \_\_\_\_\_, farmer, deceased, were on the \_\_\_\_\_ day of \_\_\_\_\_ granted to E.F. by the Surrogate Court of the County of \_\_\_\_\_, and it is alleged in the said affidavit that the said deceased made and duly executed his last will and testament, dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and appointed the said C.D. executor thereof, and that the said letters of administration ought to be called in, revoked and declared null and void in law.

It is ordered that the said E.F., within ten days after the service upon him of this order do bring into and leave in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, the aforesaid letters of administration, in order that the said C.D. may proceed in due course of law for the revocation of the same.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_.

.....  
Judge.

119. ORDER OF CITATION TO BRING IN ADMINISTRATION (ADMINISTRATOR ALLEGED NOT TO BE ENTITLED.)

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff, and  
\_\_\_\_\_, defendant.

Upon the application of C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, drayman, and upon reading the affidavit of the said C.D., filed herein, whereby it appears that letters of administration of all the estate which by law devolves upon and vests in the personal representative of A.B., late of the \_\_\_\_\_,

of \_\_\_\_\_, in the County of \_\_\_\_\_, baker, deceased, were on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, granted to E.F. by the Surrogate Court of the County of \_\_\_\_\_, as a natural and lawful brother and one of the next of kin of the said deceased, and it is alleged in the said affidavit that the said E.F. is not one of the next of kin of the said deceased, and that the said deceased died a widower, leaving the said C.D., his natural and lawful son and only next of kin, and that the said letters of administration ought to be called in and revoked and declared to be null and void in law.

It is ordered that the said E.F. do within ten days after the service upon him of this order bring to and leave in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, the aforesaid letters of administration in order that the said C.D. may proceed in due course of law for the revocation of the same.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_.

.....

Judge.

## 120. ORDER OF CITATION TO EXHIBIT INVENTORY AND ACCOUNT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Between

\_\_\_\_\_, plaintiff, and  
\_\_\_\_\_, defendant.

Upon the application of C.D., of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, butcher, and upon reading the affidavit of \_\_\_\_\_, filed herein, whereby it appears that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, letters of administration of the estate of A.B., deceased, were granted by the Surrogate Court of the County of \_\_\_\_\_, to E.F., the lawful widow and relict of the said deceased, and that the said C.D. is a creditor of the said deceased.

It is ordered that the said E.F. do within ten days after the service upon him of this order cause an appearance to be entered for him in the office of the Registrar of the Surrogate Court of the County of \_\_\_\_\_, and by virtue of his corporeal oath, exhibit, bring into, and leave in the said Registry a true and perfect inventory of all the estate of the said deceased which has at any time since his death come into the hands of the said E.F., or into his possession or knowledge, and by virtue of his right to render a just and true account of his administration thereof.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_.

.....

Judge.

121. ORDER FOR ALTERATION OF THE NAME OF THE DECEASED IN A GRANT.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

On reading the affidavit of \_\_\_\_\_, sworn on the day of \_\_\_\_\_, 19 \_\_, referring to the probate of the will (or letters of administration with will annexed of the estate) of A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, carpenter, deceased, granted by the Surrogate Court of the County of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_, whereby it appeared that in the said probate (or letters of administration with the will annexed) the name of the said deceased is given as \_\_\_\_\_, whereas the full name is \_\_\_\_\_; it is ordered:

That the said probate (or letters of administration with the will annexed) be altered by striking out the name \_\_\_\_\_, and substituting therefor the other name, \_\_\_\_\_, in the line thereof.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.

.....

Surrogate Judge.

## 122. ORDER ASSIGNING GUARDIAN TO AN INFANT FOR THE PURPOSE OF TAKING ADMINISTRATION.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of A.B., deceased.

Upon reading the affidavit of C.D., sworn on the \_\_\_\_\_ day of \_\_\_\_\_, instant, whereby it appeared that A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, died at \_\_\_\_\_, a widower and intestate, leaving him surviving E.B. and F.B., his natural and lawful and only children and only next of kin; and that the said E.B. and F.B. are now infants, to wit: the said E.B. of the age of \_\_\_\_\_ years and upwards, and the said F.B. of the age of \_\_\_\_\_ years and upwards, but under the age of fourteen years, and therefore by law incapable of acting in their own name or of electing a guardian to act in their behalf, and that there is no testamentary or other lawful guardian of the said E.B. and F.B.

And that the said C.D. is the lawful grandmother and next of kin of the said infants and is ready and willing to accept their guardianship for the purpose of taking letters of administration of the estate of the said A.B., deceased, for the use and benefit of the said infants until one of them shall attain the age of twenty-one years, it is ordered:

That the said C.D. be and she is hereby assigned guardian to the said infants for the purpose aforesaid.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ .  
(Sgd.) \_\_\_\_\_ D. F. M.,  
Surrogate Judge.

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## 123. ORDER ASSIGNING GUARDIAN TO AN INFANT FOR THE PURPOSE OF RENOUNCING.

In the Surrogate Court of the County of \_\_\_\_\_ .

In the estate of A.B., deceased.

Upon reading the affidavit of C.D., sworn on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, and filed herein, whereby it appeared that



A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, died at \_\_\_\_\_, a widower and intestate, leaving him surviving E.B., his natural and lawful and only child and only next of kin; and that the said E.B. is now an infant, to wit: of the age of \_\_\_\_\_ years and under the age of fourteen years and therefore by law incapable of acting in his own name or of electing a guardian to act on his part and behalf, and there is no testamentary or other lawful guardian of the said infant; and that the said C.D. is the lawful grandfather and next of kin of the said infant, and is ready and willing to accept the guardianship of the said infant for the purpose of renouncing for him and on his part and behalf the letters of administration of the estate of the said deceased, it is ordered:

That the said C.D. be and he is appointed guardian to the said infant for the purpose aforesaid.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

(Sgd.) J. W.,  
Surrogate Judge.

124. ORDER ASSIGNING GUARDIAN TO AN INFANT CITED.

In the Surrogate Court of the County of \_\_\_\_\_

In the estate of A.B., deceased.

## Between

, plaintiff, and  
, defendant.

Upon reading the affidavit of E.F., wherein it appears that an order has issued out of the Surrogate Court of the County of \_\_\_\_\_, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at the instance of the said plaintiff, alleging himself to be a creditor of the said deceased, citing the said defendant, the residuary legatee named in the last will and testament of the said A.B., deceased, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, to accept



late of the                      of                      , in the County of                      , deceased, and that the said defendant had entered an appearance to the said citation and that no other or further proceedings have been taken in this cause on behalf of the plaintiff since the entry of the said appearance, and it appearing that the said defendant is willing to take upon him the said letters of administration, it is ordered :

That letters of administration be issued under the seal of the said Court to the said defendant, if entitled thereto, notwithstanding the caveat entered in the estate of the said deceased, by or on behalf of the plaintiff, on his taking out the said citation.

Dated the            day of            , 19     .  
   (Sgd.)      J. W.  
   Surrogate Judge.

## 126. ORDER REVOKING PROBATE.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Upon reading the affidavit of \_\_\_\_\_, sworn on the  
day of \_\_\_\_\_, and filed herein, whereby it appears that on the  
\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, probate of the will of A.B., late  
of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, farmer,  
deceased, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, was  
granted to C.D., the sole executor therein named, and that it has  
since been discovered that the said A.B., deceased, made and  
duly executed a later will, bearing date the \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_, whereof he appointed E.F. sole executor, and the said pro-  
bate having been voluntarily brought into and left in the Regis-  
try of the said Surrogate Court, and upon the application of the  
said \_\_\_\_\_, it is hereby ordered:



128.

ORDER TO IMPOUND GRANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Upon the application of C.D., and upon reading the affidavit of C.D., filed herein, and the affidavit of E.F., of the of , in the County of , physician, and G.H., of the of , in the County of , physician, filed herein, whereby it appears that on the day of , 19 , probate of the will of A.B., late of the of , in the County of , deceased, was granted by this Court to I.K., and that since taking upon himself the said probate the said I.K. has become of unsound mind and unable to manage himself or his affairs, and that there is no committee or other person intrusted by law with the management of his estate, it is ordered:

That letters of administration with the will annexed of the estate of the said A.B., deceased, be granted to the said C.D. for the use and benefit of the said I.K. during his lunacy and until he shall become of sound mind, and that the said probate of the will of the said A.B., deceased, be brought into the registry of the said Court and impounded during the lunacy of the said I.K.

Dated the day of , 19 .

.....  
Surrogate Judge.

129. CONSENT OF OTHER NEXT OF KIN TO A GRANT BEING MADE JOINTLY TO THE WIDOW AND ONE OF THE NEXT OF KIN.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Whereas A.B., late of the of , in the County of , druggist, died on or about the day of , at the of , in the County of , leaving



C.D., his lawful widow and relict, and E.F., G.H. and I.K., his natural and lawful children and only next of kin, and whereas the said C.D. is consenting and desirous that the letters of administration of the estate of the said deceased be committed and granted to her jointly with the said E.F.

Now we, the said G.H., of the                      of                      , in the County of                      , and I.K., of the                      of                      , in the County of                      , do hereby severally declare that we expressly consent to the letters of administration of the estate of the said deceased being committed and granted to the said C.D., widow, and E.F., jointly.

In witness whereof we have hereunto set our hands and seals this                      day of                      , 19                      .

Signed and sealed by the said	}		
G.H. and I.K. in the presence		(Sgd.) G.H.	(Seal)
of		(Sgd.) I.K.	(Seal)

### 130. CONSENT OF NEXT OF KIN TO OTHER NEXT OF KIN TAKING A GRANT.

In the Surrogate Court of the County of                      .

In the estate of A.B., deceased.

Whereby A.B., late of the                      of                      , in the County of                      , hotel keeper, died on or about the                      day of                      , 19                      , at the                      of                      , in the County of                      , intestate, a widower without child or parent, brother or sister, uncle or aunt, nephew or niece, leaving C.D., and me the undersigned E.F., his lawful cousins german and only next of kin.

Now I, the said E.F., do hereby expressly consent to letters of administration of the estate of the said deceased being granted

to the said C.D., one of the lawful cousins german and next of kin of the said deceased aforesaid.

Signed and sealed by the said } (Sgd.) E. F. (Seal)  
E.F. in the presence of }

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131.

MOTION PAPER.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Between

A.B., plaintiff,

and

C. D., defendant.

A.B., late of the of , in the County of ,  
grocer, died on or about the day of , at ,  
intestate, without child or parent, leaving the said E.F., his lawful widow and relict, and the said C.D., his natural and lawful brother and only next of kin, the said E.F. having deferred taking upon her letters of administration of the estate of the said deceased, the said C.D., on the day of , 19 , extracted a citation out of this Court against her, the said E.F., to accept or refuse letters of administration of the estate of the said deceased or shew cause why the same should not be granted to him, the said C.D.

The said order of citation was afterwards on the day  
of personally served on the said E.F., and was on the  
day of returned into this Court.

No appearance has been entered to the said citation. The foregoing averments are proved by affidavits.

The Court will be moved by counsel to decree letters of administration of the estate of the said deceased to be granted to the said A.B.

## 132. POWER OF ATTORNEY TO TAKE ADMINISTRATION.

Whereas A.B., late of the                      of                      , in the County of                      , deceased, died on the                      day of                      , 19                      , intestate, leaving surviving him C.B., his lawful widow and relict.

Now I, the said C.B., at present residing at                      , hereby nominate, constitute and appoint E.F., of the                      of                      , in the County of                      , to be my lawful attorney for the purpose of obtaining letters of administration of the estate of the said A.B., deceased, to be granted to him by the Surrogate Court of the County of                      , for my use and benefit and until I shall duly apply for and obtain letters of administration of the said estate to be granted to me.

And I hereby promise to ratify and confirm whatsoever my said attorney shall lawfully do or cause to be done in the premises.

In witness whereof I have hereunto set my hand and seal this                      day of                      , in the year of our Lord 19                      .

Signed, sealed and delivered }  
in the presence of                      }

---

133. POWER OF ATTORNEY TO TAKE ADMINISTRATION WITH THE WILL ANNEXED.

Whereas, A.B., late of the                      of                      , in the County of                      , deceased, died on the                      day of                      , 19                      , having made and duly executed his last will and testament bearing date the                      day of                      , 19                      , whereof he appointed C.D. and E.F. executors:—

Now we, the said C.D. and E.F., at present residing at                      , do hereby nominate, constitute and appoint G.H. of the                      of                      , in the County of                      , to be our lawful attorney

for the purpose of obtaining letters of administration with the said will annexed of the estate of the said A.B., deceased, to be granted to him by the Surrogate Court of the County of \_\_\_\_\_, for our use and benefit and until we shall duly apply for and obtain probate of the said will to be granted to us, and we hereby promise to ratify and confirm whatsoever our said attorney shall lawfully do or cause to be done in the premises.

In witness whereof I have hereunto set my hand and seal this  
day of \_\_\_\_\_, in the year of our Lord, 19 \_\_\_\_.

The usual affidavit of execution is required.

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134. POWER OF ATTORNEY TO TAKE ADMINISTRATION WITH THE  
WILL ANNEXED FOR THE USE AND BENEFIT OF THE  
RESIDUARY LEGATEE.

Whereas A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, died on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, at \_\_\_\_\_, having made and duly executed his last will and testament, with a codicil thereto, the said will bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, and the said codicil bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, and in and by his said will nominated and appointed C.D. and E.F. executors.

And whereas the said C.D. and E.F. respectively died in the lifetime of the said deceased.

Now I, G.H., at present residing at \_\_\_\_\_, one of the residuary legatees named in the said will do hereby nominate, constitute and appoint I.K., of \_\_\_\_\_, my lawful attorney for the purpose of obtaining letters of administration with the said will and codicil annexed of the estate of the said A.B., deceased, to be granted to him by the Surrogate Court of the County of \_\_\_\_\_, for my use and benefit and until I shall duly apply for and obtain letters of administration of the said estate to be granted to me.

And I hereby promise to ratify and confirm whatsoever my said attorney shall lawfully do or cause to be done in the said premises:—

In witness whereof I have hereunto set my hand and seal this  
day of , in the year of our Lord, 19 .

Signed, sealed and delivered }  
in the presence of } G. H. (Seal)

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### 135. RENUNCIATION OF GUARDIANSHIP OF MINOR (OR INFANT).

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Whereas A.B., late of the of , in the County of , deceased, died on the day of , 19 , having made and duly executed his last will and testament, bearing date the day of , 19 , and therein appointed C.D. sole executor and residuary legatee.

And whereas the said C.D. is now a minor or infant of the age of years only.

And whereas I, the undersigned E.F., am the natural and lawful uncle and only next of kin of the said C.D.

Now I, the said E.F., do hereby renounce all my title in and to the guardianship of the said minor.

In witness whereof I have hereunto set my hand and seal this  
day of , 19 .

Signed, sealed and delivered }  
in the presence of } (Sgd.) E. F. (Seal)

---

### 136. RENUNCIATION OF LETTERS OF ADMINISTRATION BY GUARDIAN OF MINOR AND INFANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Whereas A.B., late of the of , in the County of , deceased, died on or about the day of ,



19 , intestate, a widower, leaving C.B., E.B. and F.B., his natural, lawful and only children, only next of kin and the only persons entitled in distribution to his estate.

And whereas the said C.B. and E.B. are now respectively in their minority, to wit: the said C.B. of the age of sixteen years and upwards, and the said E.B. of the age of fourteen years and upwards, but respectively under the age of twenty-one years; and the said F.B. is now in his infancy, to wit: of the age of eleven years only.

And whereas the said C.B. and E.B., the minors aforesaid, have in and by an instrument under their respective hands expressly elected me, the undersigned I.K., their lawful uncle and only next of kin, to be their guardian for the purpose of renouncing in their names and on their part and behalf all their right, title and interest in and to letters of administration of the estate of the said deceased.

And whereas I have been duly assigned the guardian of the said F.B.

Now I, the said I.K., do hereby as guardian of the said minors and infant renounce all their right, title and interest in and to letters of administration of the said estate.

In witness whereof I have hereunto set my hand and seal this  
day of , A.D. 19 .

Signed, sealed and delivered }  
in the presence of } (Sgd.) I. K. (Seal)

137. RENUNCIATION BY GUARDIAN OF INFANT.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Whereas A.B., late of the of , in the County of , deceased, died on or about the day of , 19 , a widower and intestate, and had at the time of his death a fixed place of abode at , in the said

County of \_\_\_\_\_, leaving C.D., his natural, lawful and only son and only next of kin, the only person entitled to his estate.

And whereas the said C.D. is now in his infancy, to wit: of the age of three years only; and whereas on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, by order of the said Court, G.H., the lawful grandfather and next of kin of the said infant was assigned guardian to the said infant for the purpose of renouncing for him on his part and behalf the letters of administration of the estate of the said deceased.

Now I, the said G.H., do hereby as guardian of the said infant, expressly renounce all his right, title and interest in and to letters of administration of the property of the said deceased.

In witness whereof I have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord 19\_\_\_\_.

Signed, sealed and delivered }  
in the presence of } (Sgd.) G. H. (Seal)

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138.

## RETRACTION.

In the Surrogate Court of the County of \_\_\_\_\_.

In the estate of A.B., deceased.

Whereas A.B., late of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, deceased, died on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, having at the time of his death a fixed place of abode at the \_\_\_\_\_ of \_\_\_\_\_, in the said County of \_\_\_\_\_, and having made and duly executed his last will and testament bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and thereof appointed C.D. executor and me, the undersigned E.F., residuary legatee.

And whereas the said C.D. duly renounced probate and execution of the said will, and I, the said E.F., also duly renounced letters of administration with the said will annexed of the estate of the said deceased.

And whereas letters of administration with the said will annexed of the said estate were on the                      day of                      granted by the said Court to G.H., a creditor of the said deceased; and whereas the said G.H. died on or about the day of                      , 19                      , leaving part of the said estate unadministered.

Now I, the said E.F., do hereby declare that I retract the renunciation of the letters of administration with the said will annexed to the said estate, so as aforesaid by me heretofore made.

In witness whereof I have hereunto set my hand and seal this day of                      , 19                      .

Signed, sealed and delivered }  
in the presence of                      } (Sgd.)                      E. F.                      (Seal)

139. SPECIAL GRANTS OF ADMINISTRATION.

The grant must shew on its face how those having a prior right thereto have been cleared off. Rule 11.

When the Surrogate Judge has exercised the power given by section 59 of the Surrogate Courts Act, and owing to special circumstances, made the grant to a person who but for that section would not have been entitled, the fact must be made to plainly appear in the letters of administration as well as in the oath and the administration bond. Rule 13.

In administration of a special character the recitals in the letters of administration must be framed in accordance with the facts of the case. Rule 16.

The necessary variations in the letters of administration will correspond to those made in the administrator's oath in the several cases. See forms of oath.

## 140. SPECIAL ADMINISTRATION—BONDS.

(See Rule 13.)

The condition of this obligation is such that if the above-named A.B. (who as a creditor of the estate of deceased has been appointed), the administrator of all the property, etc. (or who pursuant to the provisions of section 59 of the Surrogate Courts Act by reason of special circumstances, he not being the person who if that section had not been enacted would have been entitled to the grant of administration, has been appointed) administrator of all the property, etc.

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## 141. COMMISSION TO EXAMINE WITNESSES ABROAD.

As a commission only issues in contentious business, the form of the commission, as well as of the order for it, will be governed by the High Court and County Court practice. The style of cause is that usual in contentious business:—

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

Between

, plaintiff,

and

, defendant.

The commission is tested in the name of the Surrogate Judge, and signed by the Registrar, with the seal of the Court thereon. In all other particulars the form is that of the ordinary High Court commission.

142. PETITION TO PASS ACCOUNTS—PASSING ACCOUNTS.

In the Surrogate Court of the                      Count of                      .

In the estate of                      , deceased.

To                      , Esquire, Judge of the Surrogate Court of the

The petition of                      sheweth:

1. That the said                      of the                      of                      , in the  
Count of                      , departed this life on or about the  
day of                      , in the year of our Lord 19                      .

2. That your petitioner                      on the                      day of                      ,  
A.D. 19                      , duly appointed                      of the said deceased, as shewn  
by the records of this honourable Court                      .

3. That your petitioner                      ha                      administered the said  
estate and effects of the said deceased to the best of                      abil-  
ity, so far as the same can be administered at this time.

4. That your petitioner                      ha                      brought in and filed with the  
Registrar of this Court, a full and correct account of  
administration of the said estate, shewing all the personal pro-  
perty, money and effects, and real estate and proceeds thereof  
which ha                      come into                      hands as such                      , and also  
a full and correct account of all                      disbursements as such  
with a full and correct statement of the assets yet un-  
disposed of.

5. Your petitioner                      therefore pray that the said accounts may  
be audited, taken and passed, by and before this honourable  
Court.

6. Your petitioner                      further pray                      that                      may be  
allowed a fair and reasonable allowance for                      care, pains  
and trouble, and time expended in and about the estate of the  
said                      , deceased, and in administering, disposing of and  
arranging and settling the affairs of the said estate.

7. Your petitioner                      ha                      not hitherto been ordered any  
compensation for the services in the last preceding paragraph



referred to, either by this Court or by any other competent Court, except .

8. That the only persons interested in the administration of the estate as beneficiaries of the said deceased, are as follows:

and that all the said persons are of the full age of twenty-one, except .

9. That your petitioner know of no creditors of the estate of the said deceased who still have unsettled claims against the estate of the said deceased, which your petitioner consider to be valid, except , and that the only portion of the estate of the said deceased that remains unadministered by your petitioner is as follows, namely: and that the reason of the non-administration thereof is the following, namely: .

Dated at , this day of , A.D. 19 .

This petition is presented by

Solicitor for the above-named Petitioner.

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#### 143. APPOINTMENT TO PASS ACCOUNTS, ETC.

In the Surrogate Court of the Count of .

In the estate of A.B., deceased.

Upon reading the petition of of the said , deceased, and the petitioner having brought in and deposited with the Registrar of this Court the accounts of , receipts and expenditures in respect of the said estate, I appoint the day of , A.D. 19 , at o'clock in the noon, at my chambers in the Court House in , as the time and place for the purpose of examining, auditing and passing the said accounts.

And to fix the compensation to be allowed to , if any, for care, pains, trouble and time expended in and about

the said estate , and in administering, disposing of, arranging and settling the same.

And I do order that all persons who are or may be interested in the estate of the said , deceased, attend at the said time and place .

And I do order that a copy of this order and appointment at least days before the day above appointed be served on .

Dated at , this day of , A.D. 19 .

.....

Judge.

This appointment is taken out by

Solicitor for the above-named

NOTE.—The accounts of the said may be examined by the parties interested therein or their solicitors, at the office of the Registrar of this Court at .

—

144. AFFIDAVIT VERIFYING ACCOUNTS, ETC.

In the Surrogate Court of the Count of .

In the estate of M , deceased.

I, , of the of , in the Count of , make oath and say:—

1. That I was appointed by this honourable Court, of the said deceased.

2. That the account now shewn to me marked "A" sets forth a true and correct account of all the personal estate and effects; and of the real estate and proceeds thereof of the said estate, which have come into my hands, or into the hands of my co- or of any other person or persons on behalf, so far as I know, and also the names of the parties from

whom the same have been received, and the dates at which the same were received, to the best of my knowledge and belief.

3. That the account marked "B," now also shewn to me, sets forth a true and correct account of all the disbursements and payments made by me or by my co- or any other person for and on account of the said estate, to the best of my knowledge and belief.

4. That save and except what appears in the said account marked "A" I have not nor has my co- or of any one on behalf, so far as I know, ever received or got in any part of the said deceased's personal estate or effects, or the real estate, or the proceeds thereof during our administration of the said estate.

5. That the available assets of the said estate still undisposed of and in the hands of myself and my co- or of any other person or persons for except as hereinafter mentioned are correctly set forth in the account marked "C" now shewn to me.

6. That there is not to my knowledge or belief, any personal or real estate outstanding and unrealized in this matter save and except

7. That I have not received nor been awarded or adjudged by this Court any compensation whatever for the care, pains and trouble expended by me in and about the said estate.

Sworn before me at the  
of , in the Count of  
, this day of  
, A.D. 19 .

A Commissioner, etc.

This affidavit is filed on behalf of the

Solicitor for the

145. ORDER ON PASSING ACCOUNTS, ETC.

In the Surrogate Court of the                      Count of                      .

In the estate of                      , deceased.

Upon reading the petition of                      , of the said estate and the affidavits and accounts brought in and filed with the Registrar of this Court, I,                      , Esquire, Judge of the Surrogate Court of the County of                      , did by order of the                      , day of                      , A.D. 19                      , require that all persons interested in the estate of the said deceased, should attend at my Chambers in the Court House in                      , on the                      day of A.D. 19                      , at which time and place I would proceed to audit and pass the said accounts, and also to fix the compensation to be allowed to the said                      for                      care, pains and trouble and time expended in or about the said estate.

And having on the                      day of                      , A.D. 19                      , proceeded to take audit and pass the said accounts, pursuant to the said order, in the presence of                      .

I find and declare that the total amount of the personal estate and effects of the said deceased, which came into the hands of the said                      , amount to \$                      , and that the proceeds of the real estate of the said deceased, which came into the hands of the said                      , amount to \$                      , being a total of real and personal assets amounting to \$                      , and I find and declare that the said                      ha                      properly paid out and disbursed in the due course of administration of the said estate the sum of \$                      .

And I do hereby in pursuance of the prayer of the said petition of the said                      , order and allow                      the sum of \$                      as a fair and reasonable allowance for                      care, pains and trouble, and time expended in and about the administering and arranging and settling the affairs of the said estate to the present time.

And I do order that the costs of taking, auditing and passing

the said accounts, and fixing the said compensation amounting to \$ , as taxed by the Registrar of the Court, be allowed to the said , and having deducted the amounts so disbursed and expended and the said compensation and costs from the amount in the hands of the said , I find that there remains in the hands of the said the sum of \$ .

Dated at , this day of , A.D. 19 .

.....

Judge.

This order is taken out by

Solicitor for the above-named Practitioner.

\_\_\_\_\_

146.

#### ACCOUNTS.

In the Surrogate Court of the County of .

In the estate of A.B., deceased.

This is schedule "A" referred to in the affidavit of ,  
sworn before me this day of , 19 .

#### Receipts.

Then set out in detail all receipts, keeping those on capital account and those from rents, interest, etc., separate.

All specific gifts which have been handed over in the form in which the deceased left them, without being converted into money, should also be enumerated as receipts; and to schedule "B," which shews, with dates and items in detail, the disbursements, should be added a memorandum shewing in detail the disposition made of each such specific gift.

Schedule "C" shews in detail all assets still on hand, its form is similar to "A" and "B."

The items in Schedule "B" should be numbered consecutively, and the vouchers should also be numbered and arranged in order of the items.

Any documents shewing the amount of particular receipts as shewn in schedule "A," may be similarly dealt with.



# THE SUCCESSION DUTY ACT.

BEING

R.S.O. (1897), CAP. 24 AND AMENDMENTS THERETO.

An Act to provide for the payment of Succession Duties in certain cases.

SHORT TITLE, S. 1.	EXECUTORS, ETC., TO DEDUCT DUTY OR
INTERPRETATION, S. 2.	MAY SELL TO ENABLE PAYMENT, SS.
EXEMPTION, S. 3.	14-16.
DESCRIPTION OF PROPERTY LIABLE,	REFUND IN CERTAIN CASES, S. 17.
S. 4.	ENFORCING PAYMENT, SS. 18-19A.
INVENTORY BY EXECUTOR, S. 5.	COSTS, S. 19.
APPRAISEMENT, SS. 6-8.	FEES OF OFFICERS, S. 21.
APPEAL, S. 9.	REGULATIONS UNDER ACT, S. 22.
WHEN DUTY BECOMES PAYABLE, SS.	
11-13.	

## *Preamble.*

WHEREAS this province expends very large sums annually for asylums for the insane and idiots and for institutions for the blind and for deaf mutes, and towards the support of hospitals and other charities, and it is expedient to provide a fund for defraying part of the said expenditure by a succession duty on certain estates of persons dying as hereinafter mentioned.

Therefore His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

## *Short Title and Time of Operation of Act.*

1. This Act may be cited as *The Succession Duty Act*, and shall apply to the estates of persons dying on or after the 1st day of July, 1892, unless where it is here otherwise expressly provided. Rev. Stat. c. 24, s. 1.

*Meaning of Property.*

2.—(1) (a) The word “property” in this Act includes real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner, to his heirs or personal representatives.

*“Child.”*

(b) The word “child” within the meaning of this Act shall be deemed to include any lawful child of the deceased, or any lineal descendant of such child or any person or persons adopted before the age of twelve years by the deceased as his child or children, or any infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent, or any lineal descendant of such adopted child or infant as aforesaid born in lawful wedlock.

*“Aggregate Value.”*

(2) The phrase “aggregate value” means the value of the property after the debts, encumbrances or other allowances authorized by sub-section 4 of this section are deducted therefrom and shall include property situate outside of the province as well as property situate within the province.

*“Dutiable Value.”*

(3) “Dutiable value” means the value of the property after the debts, encumbrances or other allowances or exemptions authorized by this Act are deducted therefrom.

*Allowing for Debts in Computing Dutiable Value of Estate.*

(4) In determining the dutiable value of any property of a deceased person for purposes of the payment of succession duty hereunder, the value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral

expenses and for his debts and encumbrances; and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property; but an allowance shall not be made:—

- (a) For debts incurred by the deceased, or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest; nor
- (b) For any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained; nor
- (c) More than once for the same debt or encumbrance charged upon different portions of the estate; nor
- (d) Shall any allowance or reduction be made for the expense of administration of the estate (except Surrogate fees) or for solicitors' fees or the execution of any trust created by the will of a testator. 5 Edw. VII., c. 6, s. 3, amended by 6 Edw. VII., c. 19, s. 11, s-s 1.

The term "Surrogate fees" in this clause shall not include solicitors' fees. This amendment shall be deemed to be declaratory of the law since the passing of the Act in the first year of His Majesty's reign, chaptered 8. 6 Edw. VII., c. 19, s. 11, s-s. 1.

#### *Exemptions.*

3. No duty shall be leviable:—

#### *Estates Not Exceeding \$10,000.*

- (1) On any estate the aggregate value of which does not exceed \$10,000.

*Property Given to Charities, Etc.*

(2) On property devised or bequeathed for religious, charitable or educational purposes to be carried on by a corporation or person domiciled within the Province of Ontario.

*Property Passing to Certain Persons not Exceeding \$50,000.*

(3) On property passing under a will, intestacy, or otherwise, to or for the use of a father, mother, husband, wife, child, daughter-in-law, or son-in-law, of the deceased, where the aggregate value of the property, as defined by this Act, passing to the persons mentioned in this sub-section does not exceed \$50,000. 5 Edw. VII., c. 6, s. 6.

*Property Liable to Duty.*

4.—(1) Save as aforesaid the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the province over and above the fees payable under the Surrogate Courts Act.

*Property Situate in Province and Moveable Property of Person Domiciled Here.*

- (a) All property situate within this province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, and all moveable or personal property locally situate out of this province and any interest therein where the owner was domiciled in this province at the time of his death, whether such property passes by will or intestacy.

*Property Voluntarily Transferred in Contemplation of Death Etc.*

- (b) All property situate as aforesaid, or any interest therein or income therefrom, which shall be voluntarily trans-

ferred by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, bargainor, vendor, or donor, or made or intended to take effect, in possession or enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof;

*Donations Mortis Causa, Etc.*

- (c) Any property taken as a *donatio mortis causa* made by any person dying on or after the 7th day of April, 1896, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, including property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

*Property Vested Jointly With Interest to Survivor.*

- (d) Any property which a person dying on or after the 7th day of April, 1896, having been absolutely entitled thereto, has caused, or may cause to be transferred to, or vested in himself, and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person, including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person;



*Property Passing Under Settlement, Etc.*

- (e) Any property passing under any past or future settlement, including any trust, whether expressed in writing or otherwise, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, made by any person dying on or after the 7th day of April, 1896, by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period, determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself, the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof;

*Annuities.*

- (f) Any annuity or other interest purchased or provided by any person dying on or after the 7th day of April, 1896, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

*Property Over Which Decedent Had Power of Disposal.*

- (g) Any property of which a person dying after the 1st day of April, 1899, was at the time of his death competent to dispose; and a person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general or limited power as would, if he were *sui juris*, enable him to dispose of the property

as he thinks fit, or to dispose of the same for the benefit of his children, or some of them, whether the power is exercisable by instrument *inter vivos*, or by will, or both, including the power exercisable by a tenant in tail, whether in possession or not, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself or as mortgagee. A disposition taking effect out of the interest of the person so dying shall be deemed to have been made by him whether the concurrence of any other person was or was not required. Money which a person has a general power to charge on property shall be deemed to be property of which he has the power to dispose.

*Dower and Courtesy.*

- (*h*) Any estate in dower or by the courtesy in any land of the person so dying to which the wife or husband of the deceased becomes entitled on the decease of such person.

*Particular Description not to Restrict General Words.*

- (2) The descriptions of property in clauses (*c*), (*d*), (*e*) (*f*), (*g*) and (*h*) shall not be construed to restrict the generality of the descriptions contained in clauses (*a*) and (*b*).

*Scale of Duty Where Property Passes to Father, Mother, Child, Etc.*

- (3) Where the aggregate value of the property of the deceased exceeds \$50,000, and passes in manner aforesaid, either in whole or in part, to or for the benefit of the father, mother, husband, wife, child, son-in-law, or daughter-in-law, of the deceased, the same or so much thereof as so passes (as the case may be) shall be subject to a duty at the rate and on the scale as follows:—

- (a) Where the said aggregate value exceeds \$50,000 and does not exceed \$75,000, 1 per cent.
- (b) Exceeds \$75,000 and does not exceed \$100,000, 2 per cent.
- (c) Exceeds \$100,000 and does not exceed \$150,000, 3 per cent.
- (d) Exceeds \$150,000 and does not exceed \$200,000, 4 per cent.
- (e) Exceeds \$200,000, 5 per cent.

*Additional Duty Where Share of Any Person Exceeds \$100,000.*

(4) Provided that where the value of any dutiable property as determined by the provisions of sub-section 4 of section 2 of this Act exceeds \$100,000, and the amount passing in manner aforesaid to any one person mentioned in the next preceding sub-section exceeds the amount hereinafter mentioned, a further duty shall be paid on the amount so passing in addition to the rates in the next preceding sub-section mentioned as follows:—

- (a) Where the whole amount so passing to one person exceeds \$100,000, and does not exceed \$200,000, 1 per cent.
- (b) Exceeds \$200,000 and does not exceed \$400,000, 1½ per cent.
- (c) Exceeds \$400,000 and does not exceed \$600,000, 2 per cent.
- (d) Exceeds \$600,000 and does not exceed \$800,000, 2½ per cent.
- (e) Exceeds \$800,000, 3 per cent.

*Rate of Duty Where Property Passes to Grandparents, Brothers, Sisters, Etc.*

(5) Where the aggregate value of the property of the deceased exceeds \$10,000, so much thereof as passes to or for the benefit of the grandfather or grandmother or any other lineal

ancestor of the deceased, except the father and mother, or to any brother or sister of the deceased, or to any descendant of such brother or sister, or to a brother or sister of the father or mother of the deceased, or to any descendant of such last-mentioned brother or sister, shall be subject to a duty of \$5 for every \$100 of the value.

*Additional Duty Where More Than \$50,000 Passes to Any Person.*

(6) Provided that where the value of any dutiable property as determined by the provisions of sub-section 4 of section 2 of this Act exceeds \$50,000, and the amount passing in manner aforesaid to any one person mentioned in the next preceding sub-section, except the father and mother, exceeds the amount hereinafter mentioned, a further duty shall be paid on the amount so passing, in addition to the duty in the next preceding sub-section mentioned as follows:—

- (a) Where the whole amount so passing to one person exceeds \$50,000 and does not exceed \$100,000, 1 per cent.
- (b) Exceeds \$100,000 and does not exceed \$150,000,  $1\frac{1}{2}$  per cent.
- (c) Exceeds \$150,000 and does not exceed \$200,000, 2 per cent.
- (d) Exceeds \$200,000 and does not exceed \$250,000,  $2\frac{1}{2}$  per cent.
- (e) Exceeds \$250,000 and does not exceed \$300,000, 3 per cent.
- (f) Exceeds \$300,000 and does not exceed \$350,000,  $3\frac{1}{2}$  per cent.
- (g) Exceeds \$350,000 and does not exceed \$400,000, 4 per cent.
- (h) Exceeds \$400,000 and does not exceed \$450,000,  $4\frac{1}{2}$  per cent.
- (i) Exceeds \$450,000, 5 per cent.

*Rate Where Property Passes to Other Persons.*

(7) Where the aggregate value of the property of the deceased exceeds \$10,000, and any part thereof passes to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, save as is hereinbefore provided for, the same shall be subject to a duty of \$10 for every \$100 of the value.

*Exemption of Legacy, Etc., up to \$200.*

(8) Provided that where the whole value of any property devised, bequeathed or passing to any one person under a will or intestacy does not exceed \$200, the same shall be exempt from payment of the duty imposed by this section.

*Property Brought into Province for Distribution.*

(9) (a) Provided that any portion of the estate of any deceased person, who at the time of his death was domiciled in this province, which is brought into this province by the executors or administrators of the estate to be administered or distributed in this province shall be liable to the duty hereinbefore imposed; but if any estate, succession or legacy duty or tax has been paid upon such property elsewhere than in Ontario, and such duty or tax is equal to or greater than the duty payable on property in this province, no duty shall be payable thereon; and if the duty or tax so paid elsewhere is less than the duty payable on property in this province, then the property upon which such duty or tax has been paid elsewhere shall be subject to the payment of such portion only of the succession duty provided for in the preceding sub-sections of this section as will equal the difference between the duties payable under this Act with respect to property in the Province of Ontario and the duty or tax so paid elsewhere.



*Proviso.*

(b) Provided further that where any moveable or personal property locally situate outside the province or any interest therein as aforesaid shall have paid any estate, succession or legacy duty or tax elsewhere than in Ontario, a like allowance for the amount so paid as in the next preceding clause mentioned shall be made by this province, and the property upon which such duty or tax has been paid elsewhere shall be subject to the payment of such portion only of the succession duty provided for in the preceding sub-sections of this section as will equal the difference between the duties payable under this Act with respect to property in the Province of Ontario and the duty or tax so paid elsewhere.

*Proviso.*

(c) Provided further that allowance for any estate, succession or legacy duty or tax payable elsewhere than in the Province of Ontario shall be made under this sub-section only as to any country, state or British province or possession where an allowance is made for the succession duty paid under this Act on property situate in this province passing on the death of any person domiciled in any such country, state or British province or possession, and the Lieutenant-Governor-in-Council, by Order-in-Council, shall have extended the provisions of this sub-section as to such allowance by the Province of Ontario so as to apply to such country, state or British province or possession.

(d) The Lieutenant-Governor may, by Order-in-Council, revoke any such order, where it appears that the law of any such country, state, British province or possession has been so altered that it would not authorize the making of an order hereunder.

*Liability for Attempting to Evade Duty.*

(10) In case an executor or administrator shall in order to escape payment of succession duty, imposed by this Act, dis-

tribute any part of the said estate without bringing the same into this province, such executor or administrator shall be liable personally to pay to His Majesty the amount of the duty which would have been payable had the assets so distributed been brought within this province. Provided that this sub-section shall not apply to payments made to persons domiciled without the province out of assets situate without the province.

*Property Transferred for Bona Fide Consideration.*

(11) Nothing herein contained shall render liable for duty any property *bona fide* transferred for a consideration that is of a value substantially equivalent to the property transferred. 5 Edw. VII., c. 6, s. 8.

*Foreign Executors, Etc., not to Transfer Stock Until Duty Paid.*

4a. No foreign executor or administrator shall assign or transfer any stocks or shares in this province standing in the name of a deceased person or in trust for him which are liable to pay succession duty, until such duty is paid to the Treasurer of the province, or security given as required by section 5 of this Act, and any corporation allowing a transfer of any stocks or shares contrary to this section shall be liable to pay the duty payable in respect thereof. 62 Vict. (2) c. 9, s. 13.

*Executors, Etc., to File Inventory and Bonds for Payment of Duty.*

5.—(1) An executor or administrator applying for letters probate or letters of administration to the estate of a deceased person shall, before the issue of letters probate or administration to him, make and file with the Surrogate Registrar a full, true and correct statement under oath, shewing:—

- (a) A full itemized inventory of all the property of the deceased person and the market value thereof, and

- (b) The several persons to whom the same will pass under the will or intestacy, and the degree of relationship, if any, in which they stand to the deceased;

and the executor or administrator shall, before the issue of letters probate or letters of administration, deliver to the Surrogate Registrar a bond in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable, or which may become liable, to succession duty, executed by himself and two sureties, to be approved by the Registrar, conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of such executor or administrator of the deceased may be found liable.

Sub-section 2 of this section formerly read:—

- (2) This section shall not apply to estates in respect of which no succession duty is payable.

It was repealed by 6 Edw. VII., c. 19, s. 11, s-s. 2.

*Where no Executor or Administrator Accountable for Duty.*

(3) Where property passes on the death of the deceased and no executor or administrator can be made accountable for succession duty, if any, in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing, or the management thereof, is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, shall be accountable for the succession duty, if any, on the property, and shall, within two months after the death of the deceased, or such later time as the Treasurer of the province for the time being shall allow, deliver to the Surrogate Registrar of the county in which the said property is situate, and verify an account to the best of his knowledge and belief

of the property. Rev. Stat. c. 24, s. 5, as amended by 6 Edw. VII., c. 19, s. 11, s-s. 3.

*When Appraisement by Sheriff may be Directed.*

6. In case the Treasurer of the province is not satisfied with the value so sworn to, or with the correctness of the said inventory, the Surrogate Registrar of the county in which any property subject to the payment of the said duty is situate shall at the instance of the Provincial Treasurer, his solicitor or agent, direct in writing that the sheriff of the county or city shall make a valuation and appraise the said property, and also appraise any property alleged to have been improperly omitted from the said inventory. Rev. Stat. c. 24, s. 6. 6 Edw. VII., c. 19, s. 11, s-s. 4.

*Valuation of Property by Sheriff.*

7. In such case the sheriff shall forthwith give due and sufficient written notice to the executors and administrators and to such other persons as the Surrogate Registrar may by order direct of the time and place at which he will appraise the property included in the inventory, or any property which in the opinion of the Provincial Treasurer, his solicitor or agent should be included therein, and shall appraise the same accordingly at its fair market value, and make a report thereof in writing to the Surrogate Registrar, together with such other facts in relation thereto, as the Surrogate Registrar may by order require, and such report shall be filed in the office of the Surrogate Registrar, and for the purposes of the said enquiry and appraisement the said sheriff shall have all the powers which may be conferred upon Commissioners under the Act Respecting Inquiries Concerning Public Matters.

The sheriff shall be paid by the Treasurer of the province the following fees for services performed under this Act:—

One dollar for every hour up to five hours;

Two dollars for every hour in important or difficult cases;

In no case to exceed \$10 per diem;

His actual and necessary travelling expenses.

Rev. Stat. c. 24, s. 7, as amended by 6 Edw. VII., c. 19, s. 11, s-s. 5.

Section 8 of R.S.O. ch. 24, as amended by 62 Vict., c. 9, s. 14, and 1 Edw. VII., c. 8, s. 7, was repealed by 6 Edw. VII., c. 19, s. 11, s-s. 6, and the following substituted:—

*Mode of Assessing Property Liable to Duty.*

8. Where the Provincial Treasurer, his solicitor or agent, and the other parties interested, do not agree thereon, the Surrogate Registrar shall fix and settle the debts, encumbrances and other allowances and exemptions within the meaning of this Act, and shall also assess and fix the cash value at the date of death of the deceased of all estates, interests, annuities and life estates or terms of years growing out of such estate, and the duty to which the same is liable, and shall immediately give notice thereof, by registered letter, to such parties as by the rules of the High Court would be entitled to notice in respect of like interests in an analogous proceeding; and the Surrogate Registrar may appoint for the purpose of this Act a guardian for infants who have no guardians; and the value of every future or contingent or limited estate, income or interest in respect of which the duty is payable under this Act, shall for the purposes of this Act be determined by the rule, method and standards of mortality and of value, which are employed by the Provincial Inspector of Insurance in ascertaining the value of policies of life insurance and annuities for the determination of the liabilities of life insurance companies, save that the rate of interest to be taken for all purposes of computations under this section shall be four per cent. per annum; and the Inspector of Insurance shall on the application of any Surrogate Registrar, determine the value of such



future or contingent or limited estate, income or interest, upon the facts contained in such application, and certify the same to the Surrogate Registrar, and his certificate shall be conclusive as to the matters dealt with therein.

R.S.O. c. 24, s. 9, was repealed by 6 Edw. VII., c. 19, s. 11, s.s. 7, and the following substituted:—

*Appeal From Appraisement or Assessment.*

9. Any person dissatisfied with the report of the sheriff or the assessment of the Surrogate Registrar, may appeal therefrom to the Surrogate Judge of the county within thirty days after the making and filing of such report or the mailing of notice of such assessment, as the case may be, and upon such appeal the said Judge shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate or any part thereof for such duty, and the decision of the Surrogate Judge shall be final, unless the property or the debts and other allowances and exemptions in respect of which such appeal is taken shall exceed in value or amount the sum of \$10,000, when a further appeal shall lie from the decision of the Surrogate Judge to a Judge of the High Court, and from such Judge of the High Court to the Court of Appeal, whose decision shall be final.

[*Rev. Stat. c. 24, s. 10, repealed by 1 Edw. VII., c. 8, s. 5.*]

*Future Estate When Duty Payable.*

11.—(1) Where the dutiable property (real or personal) includes any future or contingent estate, income or interest, the duty on such estate, income or interest may be paid within the time limited by sub-section 1 of section 12, and where so paid the duty shall then be on a value not less in any event than the puted under section 8 as at the death of the deceased. By consent of the Provincial Treasurer in writing, duty may be paid after the time so limited and before such estate, income or interest comes into possession; but in event of such consent, the

duty shall then be on a value not less in any event than the value of such estate, income or interest computed under section 8 as at the date when the duty is paid; and no deduction shall be made for duty paid or payable on any prior estate, income or interest. The duty on any future or contingent estate, income or interest, if not sooner paid (as in this sub-section provided) shall be payable forthwith when such estate, income or interest comes into possession, in which case the duty shall be on the value computed under section 8 as at the date of such coming into possession; and no deduction shall be made for duty paid or payable on any prior estate, income or interest.

*Duty Paid Before Estate Comes Into Possession.*

(2) Where the duty on any future or contingent estate, income or interest has been paid by the executor, administrator or trustee before such estate, income or interest comes into possession, the duty so paid shall be charged on such future or contingent estate, income or interest, and shall be repaid with interest at the rate mentioned in section 8, to the executor, administrator or trustee, as the case may be, by the person who is to become entitled to such future or contingent estate, income or interest; and if not sooner repaid shall then be repaid at the time when such estate, income or interest comes into possession.

*When no Person is Entitled to the Present Enjoyment of a Future or Contingent Estate.*

(3) Where in respect of any future or contingent estate or interest, there is no person beneficially entitled to the present income or enjoyment, or where there is some part thereof to which there is no person so entitled, the duty on such future or contingent estate or interest, or on part thereof, as the case may be, shall be payable as in sections 11 and 12 provided.

*Commuting Duties on Future Estates or Interests.*

(4) Notwithstanding the duty may under this section not be payable until the time when the right of possession or actual enjoyment accrues, any executor, administrator, guardian or trustee, or person owning a prior interest, when such executor, administrator, guardian, or trustee, or person has the custody or control of the property, may agree upon or commute for a present payment out of the property in discharge of the said duty; and the Treasurer of the Province may, upon the application of any such person, commute the succession duty, which would or might, but for the commutation, become payable in respect of such interest, for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty and interest; and on the receipt of such sum the Treasurer shall give a certificate of discharge from such duty. 1 Edw. VII., c. 8, s. 8.

*Duties to be Payable Within 18 Months from Death of Owner.*

12.—(1) The duties imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the deceased, or within eighteen months thereafter, and if the same are paid within eighteen months no interest shall be charged or collected thereon, but if not so paid interest at the rate of five per centum per annum from the death of the deceased shall be charged and collected, and such duties, together with the interest thereon, shall be and remain a lien upon the property in respect to which they are payable until the same is paid. Provided that the duty chargeable upon any legacy given by way of annuity, whether for life or otherwise, shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective

payments of the three succeeding years' annuity respectively. In case the annuitant dies before the expiration of the said four years, only payment of instalments which fall due before his death shall be required. Rev. Stat. c. 24, s. 12(1); 1 Edw. VII., c. 8, s. 9(1), as amended by 6 Edw. VII., c. 19, s. 11, s-s. 8.

*Extension of Time for Payment.*

(a) The Lieutenant-Governor-in-Council, upon its being proved to his satisfaction that payment of the duty within the time limited by sub-section 1 of this section would be unduly onerous on the estate, may, by Order-in-Council, so extend the time for the payment of the said duty as shall appear just and reasonable; and the duty shall be due and payable as in the said Order-in-Council set forth. 1 Edw. VII., c. 8, s. 9(2).

*Certificate of Discharge to be Given by Provincial Treasurer.*

(2) The Treasurer of the Province, on being satisfied that the full amount of succession duty has been or will be paid in respect of an estate or any part thereof, shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for succession duty the property shewn by the certificate to form the estate, or such part thereof, as the case may be. Rev. Stat. c. 24, s. 12(2).

*Certificate not a Discharge in Case of Fraud, Etc.*

(3) Such certificate shall not discharge any person or property from succession duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shewn to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for. Provided the said Treasurer may in his discre-

tion decline to grant such certificate until the expiration of one year from the death of the deceased testator or intestate, as the case may be. Rev. Stat. c. 24, s. 12(3); 1 Edw. VII., c. 8, s.

*Except as to Bona Fide Purchaser.*

(4) Provided, however, that a certificate purporting to be a discharge of the whole succession duty payable in respect of any property included in the certificate shall exonerate from the duty a *bona fide* purchaser for valuable consideration without notice, notwithstanding any such fraud or failure. Rev. Stat. c. 24, s. 12(4).

*Extension of Time for Payment of duty.*

13. The Surrogate Judge may make an order upon the application of any person liable for the payment of said duty, extending the time fixed by law for payment thereof, where it appears to such Judge that payment within the time prescribed by this Act is impossible, owing to some cause over which the person liable has no control. Rev. Stat. c. 24, s. 13.

*Administrators, Etc., to Deduct Duty Before Delivering Property.*

14. Any administrator, executor or trustee having in charge or trust any estate, legacy or property subject to the said duty shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon. Rev. Stat. c. 24, s. 14.

*Power to Sell for Payment of Duty.*

15. Executors, administrators and trustees shall have power to sell so much of the property of the deceased as will enable them to pay the said duty in the same manner as they may by law do for the payment of debts of the testator or intestate. Rev. Stat. c. 24, s. 15.



*Duty to be Paid to Provincial Treasurer.*

16. Every sum of money retained by an executor, administrator or trustee, or paid into his hands for the duty on any property, shall be paid by him forthwith to the Treasurer of the province, or as he may direct. Rev. Stat. c. 24, s. 16.

*Refunding Duty Upon Subsequent Payment of Debts.*

17. Where any debts shall be proven against the estate of a deceased person, after the payment of legacies or distribution of property from which the duty has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the duty so paid shall be repaid to him by the executor, administrator or trustee, if such duty has not been paid to the Treasurer of the province, or by the Treasurer if it has been so paid. Rev. Stat. c. 24, s. 17.

*Mode of Enforcing Payment of Duty.*

18. If it appears to the Surrogate Judge that any duty accruing under this Act has not been paid according to law, he shall make an order directing the persons interested in the property liable to the duty to appear before the Court on a day certain to be therein named and shew cause why said duty should not be paid. The service of such order, and the time, manner and proof thereof, and fees therefor, and the hearing and determining thereon, and the enforcement of the judgment of the Court thereon shall be according to the practice in or upon the enforcement of a judgment of the High Court. Rev. Stat. c. 24, s. 18.

*Costs.*

19. The costs of all such proceedings shall be in the discretion of the Court or Judge, and shall be upon the County Court scale unless and until another tariff shall be provided, save as to the costs of an appeal, and then upon the scale of the Court appealed to. Rev. Stat. c. 24, s. 19.

*Recovery of Succession Duties by Action.*

19a.—(1) Any sum payable under this Act shall be recoverable with full costs of suit as a debt due to His Majesty from any person liable therefor by action in any Court of competent jurisdiction, and it shall not in any case be necessary to take the proceedings authorized by sections 6 to 10 of this Act. 62 Vict. (2) c. 9, s. 1.

*Matters to be Determined by High Court in Action.*

(2) The High Court shall also have jurisdiction to determine what property is liable to duty under the said Act, the amount thereof, and the time or times when the same is payable, and may itself or through any referee exercise any of the powers which by the said sections 6 to 10 are conferred upon any officer or person. 62 Vict. (2) c. 9, s. 2.

*Action May be Brought Before Time for Payment of Duty.*

(3) Subject to the discretion of the Court as to the costs, an action may be brought for any of the purposes in this Act mentioned, notwithstanding the time for the payment of the duty has not arrived. 62 Vict. (2) c. 9, s. 3.

*Production of Documents, Examination of Witnesses, Etc.*

(4) In every such action His Majesty's Attorney-General shall have the same right, either before or after the trial, to require the production of documents, to examine parties or witnesses, or to take such other proceedings in aid of the action as a plaintiff has or may take in an ordinary action. 62 Vict. (2) c. 9, s. 4.

*Ordering Trial of Issues.*

(5) Where for the better determining any question raised in any such action the Court deems it advisable to order the trial of an issue or issues, it may give such directions in that behalf as it deems expedient. 62 Vict. (2) c. 9, s. 5.

*References.*

(6) In case the Court shall think fit at any time to direct a reference, such reference need not be to a Surrogate Registrar or to a sheriff, but may be to an officer of the Court as provided by the Judicature Act. 62 Vict. (2) c. 9, s. 6.

*Appeals in Action Under Act.*

(7) An appeal shall lie in an action brought under this Act wherever an appeal would lie if the action were between subject and subject, and to the like tribunal. 62 Vict. (2) c. 9, s. 7.

*Declaration as to Liability of Property Transferred Before Death.*

(8) Where any property which has, previous to the death of a person whose estate is subject to duty, been conveyed or transferred to some other person, is declared liable to duty, the Court may declare the duty to be a lien upon the property, and may make such declaration, although the amount of such duty has not been ascertained, and where any property which, had it remained in the hands of the person to whom or for whose benefit it was conveyed or transferred by such deceased person, would have been liable to duty, has been conveyed or transferred to any purchaser for valuable consideration, the Court may direct the person to whom or for whose benefit the said property was conveyed or transferred by such deceased person as aforesaid to pay the amount of the duty to which such property would have been subject as aforesaid. 62 Vict. (2) c. 9, s. 8.

*Registration of Caution.*

(9) In case it is claimed that any land or money secured by any mortgage or charge upon land is subject to duty, the Provincial Treasurer or the Solicitor to the Treasury acting in his behalf, may, when deemed necessary, cause to be registered in the proper registry office, or, if the land is registered under the Land Titles Act, in the proper office of land titles, a caution stat-

ing that succession duty is claimed by the Provincial Treasurer in respect of the said land, mortgage or charge on account of the death of the deceased, naming him, and any subsequent dealing with such land, mortgage or charge shall be subject to the lien for such duty, but nothing herein contained shall affect the rights of the Crown to claim a lien independently of the said caution. 62 Vict. (2) c. 9, s. 9.

*Retrospective Operation of Preceding Provisions.*

(10) The preceding sub-sections of this section shall apply to the estates of all persons in respect of which the duty is claimed, whether such persons have died before or shall die after the 1st day of April, 1899. 62 Vict. (2) c. 9, s. 19.

[*Rev. Stat. c. 24, s. 20, repealed by 5 Edw. VII., c. 6, s. 9, as to claims not barred before 25th May, 1905.*]

*Fees of Judges and Registrars.*

21. The Judges and Registrars of the several Surrogate Courts, and solicitors practising therein, shall be entitled to take for the performance of duties and services under this Act, similar fees to those payable to them under and by virtue of the Surrogate Courts Act and the Surrogate Court Rules for similar proceedings, and section 83 of such Act shall apply to the fees payable under this Act to the Surrogate Judge. Rev. Stat. c. 24, s. 21. 6 Edw. VII., c. 19, s. 11, s-s. 9.

*Lieutenant-Governor-in-Council May Make Regulations.*

22. The Lieutenant-Governor-in-Council may make regulations for carrying into effect the provisions of this Act, and such regulations shall be laid before the Legislative Assembly forthwith, if the Legislature is in session at the date of such regulations, and if the Legislature is not in session such regulations shall be laid before the House within the first seven days of the session next after the same are made. Rev. Stat. c. 24, s. 22.

REGULATIONS MADE BY ORDER OF HIS HONOUR THE  
LIEUTENANT-GOVERNOR-IN-COUNCIL FOR CARRY-  
ING INTO EFFECT THE SUCCESSION DUTY ACT.

1. On *all* applications for letters probate or letters of administration made to any Surrogate Court in Ontario the applicant or applicants shall make and file with the Surrogate Registrar, at the time of filing the papers required by the practice of the Surrogate Courts, two duplicate original affidavits of value and relationship, attaching thereto itemized inventories shewing full particulars of the property and the fair market value thereof and schedules of relationship according to the forms numbered 1 hereunder.

2. Such affidavits shall be made and filed in all cases without regard to the nature or value of the property of the deceased.

3. When the aggregate value of the property wheresoever situate, including any gift, transfer, or other disposition *inter vivos*, or other property within the meaning of section 4, sub-section 1, of the Act, does not exceed \$5,000, the applicant or applicants may make and file two duplicate original affidavits of value and relationship in the short form, attaching thereto itemized inventories and schedules of relationship according to the forms numbered 2 hereunder, in lieu of those required by regulation 1.

4. Where no executor or administrator can be made accountable for the proper succession duty, the account required by section 5, sub-section 3, shall conform to the Forms 1 or 2, according to the value of the property.

5. The Surrogate Registrar shall forthwith on receipt thereof forward one of such duplicate original affidavits or accounts to the Solicitor to the Treasury at the Succession Duty Office, Toronto, and shall at the same time forward to the Provincial Treasurer of Ontario, Toronto, a notice in the form numbered 2 A hereunder.



6. The Solicitor to the Treasury shall, upon receipt of the said affidavit of value and relationship, or account with schedules attached, determine whether, in his opinion, the property of the deceased is liable or may become liable to succession duty, and in case he considers the same to be liable, or likely to become liable, require security to be given, which security may be given by bond in the form numbered 3 hereunder.

7. In cases where a bond is required to be given under the next preceding regulation, such bond shall be in a penal sum equal to ten per centum of the sworn value of the property of the deceased person liable, or which may become liable, to succession duty, and shall be executed by the applicant, or all the applicants in case there are more than one, each of whom shall be bound in the whole amount of such bond, and two sureties to be approved by the Surrogate Registrar, who shall justify each in an amount equal to the sum for which he is to be liable, and the aggregate shall equal the amount of the penalty of the bond, and such bond shall be conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant, or applicants, may be found liable.

8. This bond is to be filed in the office of the Registrar of the Surrogate Court to which application is made, and a certified copy thereof sent forthwith to the Solicitor to the Treasury at the Succession Duty Office.

9. No letters probate or letters of administration shall issue without the consent in writing of the Solicitor to the Treasury or someone deputed by the Treasurer to act for him.

10. In cases where security has been given for the payment of succession duty as aforesaid, notice of any appointment for the passing of the accounts of the executors or administrators shall be served upon the Solicitor to the Treasury by the executor or administrator or his solicitor, together with a copy of the accounts.

11. One week's notice of valuation and appraisement under

section 7 of the Act to all the parties interested or their solicitors or agents before proceeding therewith, shall *prima facie* be considered sufficient notice.

12. All appointments of a guardian by the Registrar must be made with the privity and consent of the Official Guardian.

13. The fees payable under section 21 of the Act shall be the same as those payable in contentious matters under the Surrogate Courts Act.

14. The subjoined forms are to be followed as nearly as the circumstances of each case allow.

FORM 1.—AFFIDAVIT OF VALUE AND RELATIONSHIP.

*This Affidavit is to be made by all persons applying for Letters.*

THE SUCCESSION DUTY ACT. (ONTARIO.)

Canada,  
Province of Ontario. }

In the Surrogate Court of the.....  
of .....

In the matter of the estate of                      late of the                      of  
in the                      of                      , deceased.

I,                      , make oath and say:—

That                      a                      the applicant for letters                      to  
the estate of                      , who died on or about the                      day of  
                    , A.D. 19                      , domiciled in                      .

That                      have caused to be filed in the office of the Registrar of the above-named Court a petition praying that letters  
be granted to the estate of the said deceased by the said  
Court.

That                      have made full, careful and searching enquiry for the purpose of ascertaining what real and personal property and effects the said deceased was possessed of, or entitled to, at the time of his death, together with the market value thereof respectively.

That                    have according to the best of                    knowledge, information and belief, set forth in the inventory herewith exhibited, marked "A.," a full, true and particular account of all the real and personal estate of the said deceased, or of which he was possessed, or to which                    he was entitled at the time of h                    death, together with the market value as at the *date of death* of each and every asset forming part of the said real and personal estate, and particularized in the said inventory. The said inventory includes all real and personal estate of which the deceased was competent to dispose or over which the deceased had a power of appointment. The gross value of the said estate as at date of deceased's death was \$                    .

That                    have included in the said inventory every security, debt and sum of money outstanding due or payable to, or standing to the credit of the said deceased at the time of h                    death, and in estimating the value thereof have included all the interest due, payable, chargeable and accruing due thereon up to the death of the said deceased.

That save and except what is set forth in the said inventory, the said deceased was not, to the best of                    knowledge, information and belief, at the time of h                    death possessed of, or entitled to, any debt or sum of money or any security, pledge or undertaking for the payment of any money to h                    on any account whatsoever, or to any leasehold or other personal estate, goods, chattels or effects in possession or reversion absolutely or contingently or otherwise howsoever.

That in the said inventory is included all the property of the said deceased situate outside of this province as well as the property situate within the province.

That save and except what is set forth in the said inventory, the said deceased was not to the best of                    knowledge, information and belief, at the time of h                    death, seized of, or entitled to, any real estate in possession, remainder and reversion absolutely or contingently or otherwise howsoever.

That to the best of                    knowledge, information and belief the said deceased did not voluntarily transfer by deed, grant or gift, made in contemplation of h        death, or made, or intended to take effect in possession or enjoyment after h        death, any property or any interest therein, or income therefrom to any person in trust or otherwise by reason whereof any person is or shall become beneficially entitled in possession or expectancy in or to the said property or income thereof.

That to the best of                    knowledge, information and belief the said deceased did not at any time within twelve months previous to the date of h        death transfer by way of *donatio mortis causa* or purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise, any property whatsoever.

That to the best of                    knowledge, information and belief the said deceased did not at any time previous to the date of h        death transfer any property of which property the *bona fide* possession was not assumed by the donee immediately upon the gift, and thenceforth retained to the entire exclusion of the donor or any benefit to h        by contract or otherwise.

That to the best of                    knowledge, information and belief, the said deceased did not transfer or cause to be transferred to or vested in h        self and any other person jointly any property to which                    was absolutely entitled by purchase or investment or in any other manner whatsoever so that the beneficial interest therein or in some part thereof passed or accrued by survivorship on h        death to such other person.

That to the best of                    knowledge, information and belief, the said deceased was not at the time of h        death a party to any past or future settlement, including any trust, whether expressed in writing or otherwise, whether made for valuable consideration or not, as between the settlor and any other person and not taking effect as a will whereby an interest in such property or the proceeds of the sale thereof for life, or any other period

determinable by reference to death, was reserved expressly or by implication to the deceased, or whereby the deceased reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property or the proceeds of the sale thereof, or otherwise resettle the same or any part thereof.

That to the best of knowledge, information and belief no annuity or other interest had been purchased or provided by the said deceased either by himself alone or in concert or by arrangement with any other person.

That have in the schedule marked exhibit "B." set forth the names of the several persons to whom the property of the said deceased will pass, the degrees of relationship, if any, in which they stand to the deceased, their addresses so far as can ascertain them, and the nature and value of the property passing to each of these persons respectively.

Sworn before me at the  
of

in the Count of  
this day of  
A.D. 19 .

*A Commissioner or Notary Public, etc.*

*This Affidavit is filed on behalf of the applicant by.....*  
h Solicitor.

---

FORM 2.—SHORT AFFIDAVIT OF VALUE OPTIONAL UNDER REGULATION 3.

*This Affidavit to be made by all persons applying for Letters.*

THE SUCCESSION DUTY ACT. (Ontario.)

Province of Ontario. }  
Canada, }

In the Surrogate Court of the County of.....  
.....



In the matter of the estate of                      late of the                      of  
in the County of                      , deceased.

(I or we)                      make oath and say:—

That                      a                      the applicant for letters                      of  
the above-named                      , who died on or about the                      day  
of                      , 19                      , domiciled in                      .

That                      have according to the best of                      knowl-  
edge, information and belief set forth in the inventory herewith  
exhibited, marked “A.,” a full, true and particular account of  
all the real and personal estate of the said deceased situate out-  
side as well as within the Province of Ontario or of which the  
said deceased was possessed or to which he was entitled at the  
time of his death either in possession, remainder or reversion  
absolutely, contingently or otherwise howsoever, together with  
the market value as at the date of death of each and every asset,  
and the gross value thereof did not exceed the sum of \$5,000.  
The said inventory includes all real and personal estate of which  
the deceased was competent to dispose or over which the de-  
ceased had a power of appointment.

That the said deceased did not so far as                      have been  
able to ascertain after a careful and searching investigation of  
his affairs make any gift, transfer, delivery, declaration of trust,  
settlement, deed or other instrument of appointment, purchase  
or investment of annuity or other interest, or other disposition  
of any kind whatsoever within the meaning of section 4 of the  
Succession Duty Act, except (*Give particulars of gifts or other  
dispositions.*)

That                      have in the schedule herewith exhibited, marked  
“B.,” set forth the names of the several persons to whom the pro-  
perty of the said deceased will pass, the degrees of relationship,  
if any, in which they stand to the deceased, their addresses so



Securities for Money, Including Life Insurance.	Principal.	Interest.	Total.

Book Debts and Promissory Notes, etc.	Principal.	Interest.	Total.

Number of shares.	Bank and Other Stocks.	Amount Paid Up.	Par Value.	Market Value.

## SUMMARY.

	Principal.	Interest.	Total.
Real Estate.....			
Household Goods and Furniture .....			
Farming Implements, etc.....			
Stock in Trade, including good will.....			
Horses .....			
Horned Cattle.....			
Sheep and Swine .....			
Book Debts and Promissory Notes.....			
Moneys Secured by Mortgage.....			
Bank Stock and other Stocks.....			
Securities for Money, including Life Insurance.....			
Cash in Bank and on Hand.....			
Farm Produce of all Kinds .....			
Other Personal Property not before mentioned (if any). .....			
Total.....			

This is Schedule "A." referred to in the affidavit of value  
and relationship of .

Sworn to on the  
day of . A.D. 19 . }

.....

*A Commissioner, etc., or Notary Public, etc.*

### SCHEDULE B.—FORMS 1 AND 2.

#### IN THE SURROGATE COURT

of the Count of .

#### THE SUCCESSION DUTY ACT. (Ontario.)

In the matter of the estate of , deceased, late of the  
of in the Count of .

Name.	Relationship.	Address.	Property Passing.	Value.

This is Schedule "B." referred to in the affidavit of value and  
relationship of .

Sworn to on the  
day of , A.D. 19 . }

.....

*A Commissioner, etc., or Notary Public, etc.*

No.....

#### FORM 2A.—NOTICE OF APPLICATION FOR LETTERS.

#### THE SUCCESSION DUTY ACT.

IN THE SURROGATE COURT OF THE

Count.....of.....

In the matter of the estate of....., deceased.  
(Strike out the irrelevant words.)

Notice is hereby given that application for letters probate, of administrations, with the will annexed, has been received as herein set forth:

Name of deceased. . . . .

Date of death. . . . .

Domicile at death. . . . .

Name or Names

of applicant } . . . . .

of applicants } . . . . .

Name of applicant's solicitor. . . . .

Value of assets in Ontario. . . . .

Value of assets, if any, elsewhere than in Ontario. . . . .

Dated at. . . . .

. . . . . day of . . . . ., 19 .

*The Hon.*

*Surrogate Registrar.*

*The Treasurer of the Province of Ontario.*

---

FORM 3.—BOND BY APPLICANTS FOR LETTERS.

THE SUCCESSION DUTY ACT.

In the Surrogate Court of the

In the matter of the estate of , deceased.

Know all men by these presents that we of the  
of , in the Count of , of the  
of , in the Count of , of the of ,  
in the Count of , are jointly and severally bound unto  
His Majesty the King in the sum of \$ , to be paid to the  
Treasurer of the Province of Ontario for the time being, for  
which payment well and truly to be made we bind ourselves and



each of us for the whole and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated the                      day of                      , in the year of our Lord A.D. 19                      .

The condition of this obligation is such that if the above-named                      the                      of all the property of                      late of the                      of                      , in the County of                      , deceased, who died on or about the                      day of                      , A.D. 19                      , do well and truly pay or cause to be paid to the Treasurer of the Province of Ontario for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate and effects of the said deceased coming into the hands of the said

may be found liable under the provisions of the Succession Duty Act, within eighteen months from the date of the death of the said deceased or such further time as may be given for payment thereof under section 13 of the Succession Duty Act or such further time as he may be entitled to otherwise by law for payment thereof then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue.

Signed, Sealed and Delivered in                      }  
the presence of                      }

#### AFFIDAVIT OF JUSTIFICATION.

Count                      of                      } I,  
To Wit,                      }

one of the sureties in the annexed bond named, make oath and as follows:—

(1) I am seised and possessed to my own use of property in the Province of Ontario, of the actual value of                      dollars, over and above all charges upon and incumbrances affecting the same.

(2) I am worth the sum of                      dollars, over and above my just debts and any sum for which I am liable as surety or otherwise, except upon the said bond.

(3) My post office address is as follows:—

Sworn before me at                      ,  
 in the Count                      of                      ,  
 this                      day of                      , 19                      .

.....  
*A Commissioner, etc.*

#### AFFIDAVIT OF JUSTIFICATION.

Count                      of                      : } I,  
                     To Wit,                      }

one of the sureties in the annexed bond named, make oath and say as follows:—

(1) I am seised and possessed to my own use of property in the Province of Ontario, of the actual value of                      dollars over and above all charges upon and incumbrances affecting the same.

(2) I am worth the sum of                      dollars, over and above my just debts, and any sum for which I am liable as surety or otherwise, except upon the said bond.

(3) My post office address is as follows:—

Sworn before me at                      ,  
 in the Count                      of                      ,  
 this                      day of                      , 19                      .

.....  
*A Commissioner, etc.*

## AFFIDAVIT OF EXECUTION.

Count                      of                      : } I,  
                                  To Wit,                      } in the Count                      of  
 make oath and say as follows:—

(1) I am the person whose name is subscribed to the annexed bond as the attesting witness to the execution thereof, and the signature                      set and subscribed thereto, as such attesting witness, is of my proper handwriting, and my name and addition are correctly above set forth.

(2) I was present and did see the said bond duly signed and executed by                      , therein named.

(3) I am well acquainted with the said

Sworn before me at                      ,  
 in the Count                      of                      ,  
 this                      day of                      , 19                      .

.....

*A Commissioner, etc.*

## FORM 4.—DIRECTION TO SHERIFF TO MAKE VALUATION.

(SECTION 6.)

## THE SUCCESSION DUTY ACT.

In the Surrogate Court of the

In the matter of the estate of                      , deceased.

To the Sheriff of                      Count                      of                      .

At the request of the Treasurer of the Province of Ontario, I hereby direct that you do make a valuation and appraisement of all property of the deceased and report to me the result of such valuation and appraisement forthwith after making the same.

Dated at                      , this                      day of                      , A.D.

## FORM 5.—NOTICE BY SHERIFF. (SECTION 7.)

## THE SUCCESSION DUTY ACT.

In the Surrogate Court of the

In the matter of the estate of \_\_\_\_\_, deceased.

*To*

Take notice that by an order made by the Registrar of the Surrogate Court, of the \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, I have been directed to make a valuation and appraisement of the property which the said \_\_\_\_\_ died seised or possessed of or entitled to, and further take notice that pursuant to the said order, I will on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ of the clock, in the \_\_\_\_\_ noon, at \_\_\_\_\_, proceed to make such valuation and appraisement, of which all parties are required to take notice and govern themselves accordingly.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_  
 \_\_\_\_\_ Sheriff of the \_\_\_\_\_ of \_\_\_\_\_

---

## FORM 6.—REPORT OF SHERIFF. (SECTION 7.)

## THE SUCCESSION DUTY ACT.

In the Surrogate Court of the

In the matter of the estate of \_\_\_\_\_, deceased.

*To the Judge of the said Surrogate Court:*

Pursuant to an order made in this matter and dated the \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19 \_\_\_\_\_, directing me to make a valuation and appraisement of the property which the above-named deceased died possessed or seised of or entitled to, having duly notified all parties (*or as the case may be*) entitled thereto, I proceeded in the presence of \_\_\_\_\_ to make an appraisement and

valuation of said property at its fair market value, and do value and appraise the same at the sum of \$ \_\_\_\_\_ as appears from the schedule hereto annexed.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, A.D.  
 \_\_\_\_\_  
 Sheriff of \_\_\_\_\_

---

FORM 7.—ORDER OF JUDGE. (SECTION 18.)

THE SUCCESSION DUTY ACT.

In the Surrogate Court of the

In the matter of the estate of \_\_\_\_\_, deceased.

It appearing to me that there is duty unpaid accruing under the Succession Duty Act, in respect of the property of the above deceased, and that the same has not been paid, I do hereby order and direct that \_\_\_\_\_ do appear before this Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ of the clock in the \_\_\_\_\_ noon, to shew cause why he should not forthwith pay to the Treasurer of the Province of Ontario the sum of \_\_\_\_\_, being duty payable to said Treasurer in respect of the property of the above deceased under the said the Succession Duty Act, and why such payment should not be enforced according to the practice in or upon the enforcement of a judgment of the High Court.

---

FORM 8.—CERTIFICATE OF DISCHARGE.

THE SUCCESSION DUTY ACT. (Ontario.)

In the matter of the estate of \_\_\_\_\_, late of \_\_\_\_\_, in the  
 County of \_\_\_\_\_ of \_\_\_\_\_, deceased.

CERTIFICATE OF DISCHARGE.

(Section 12.)

This is to certify that the full amount of Succession Duty payable on the estate of the above-named deceased as set out in



the affidavits and papers filed in the Succession Duty Office has been paid and the property therein set forth is therefore discharged from any further claim to Succession Duty.

This certificate is given under the terms and subject to the conditions of Section 12 of the Succession Duty Act.

Dated at Toronto, this                      day of                      , 19   .

*Provincial Treasurer.*

*Countersigned*

*Solicitor to the Treasury.*



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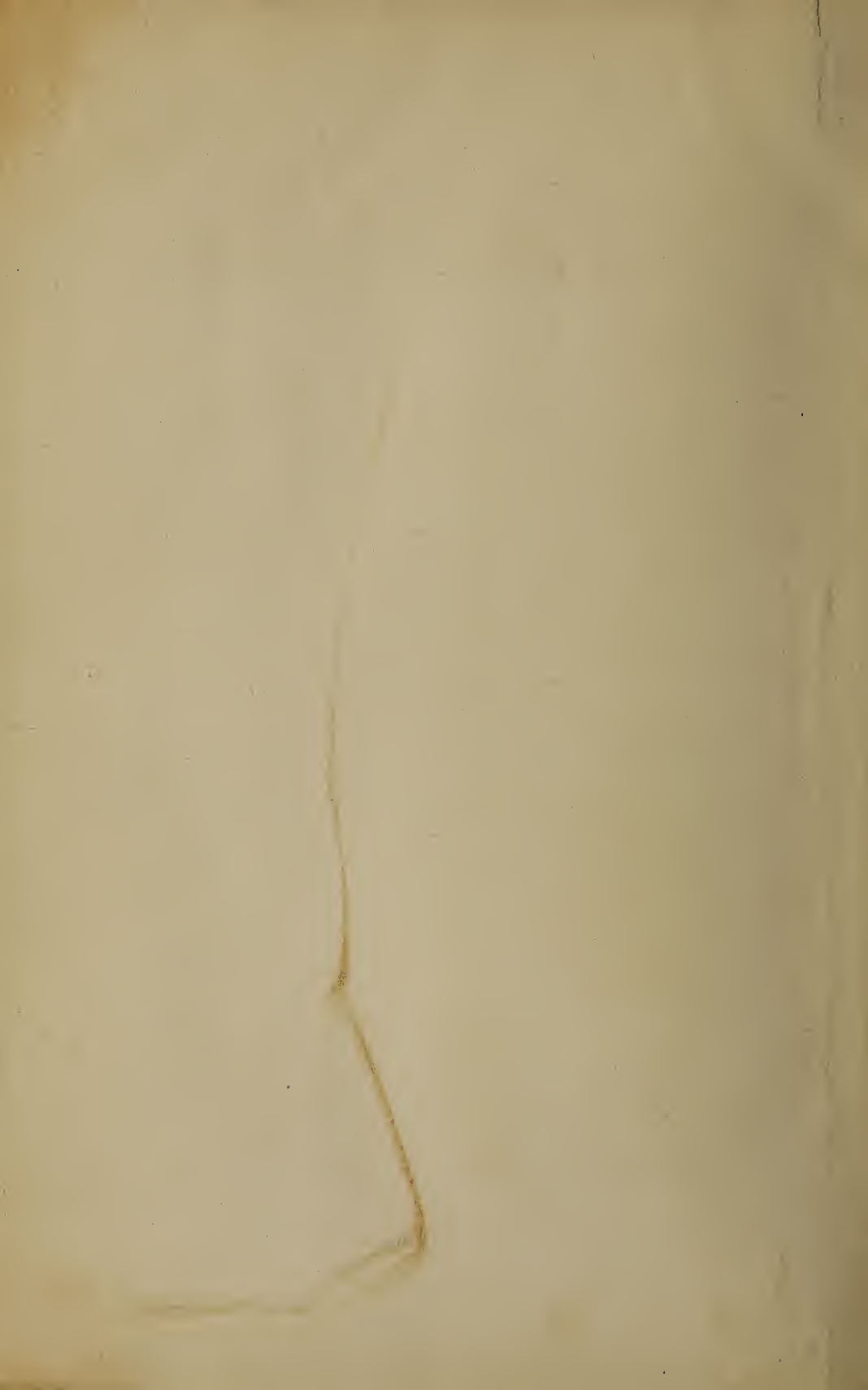
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